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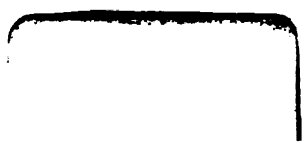
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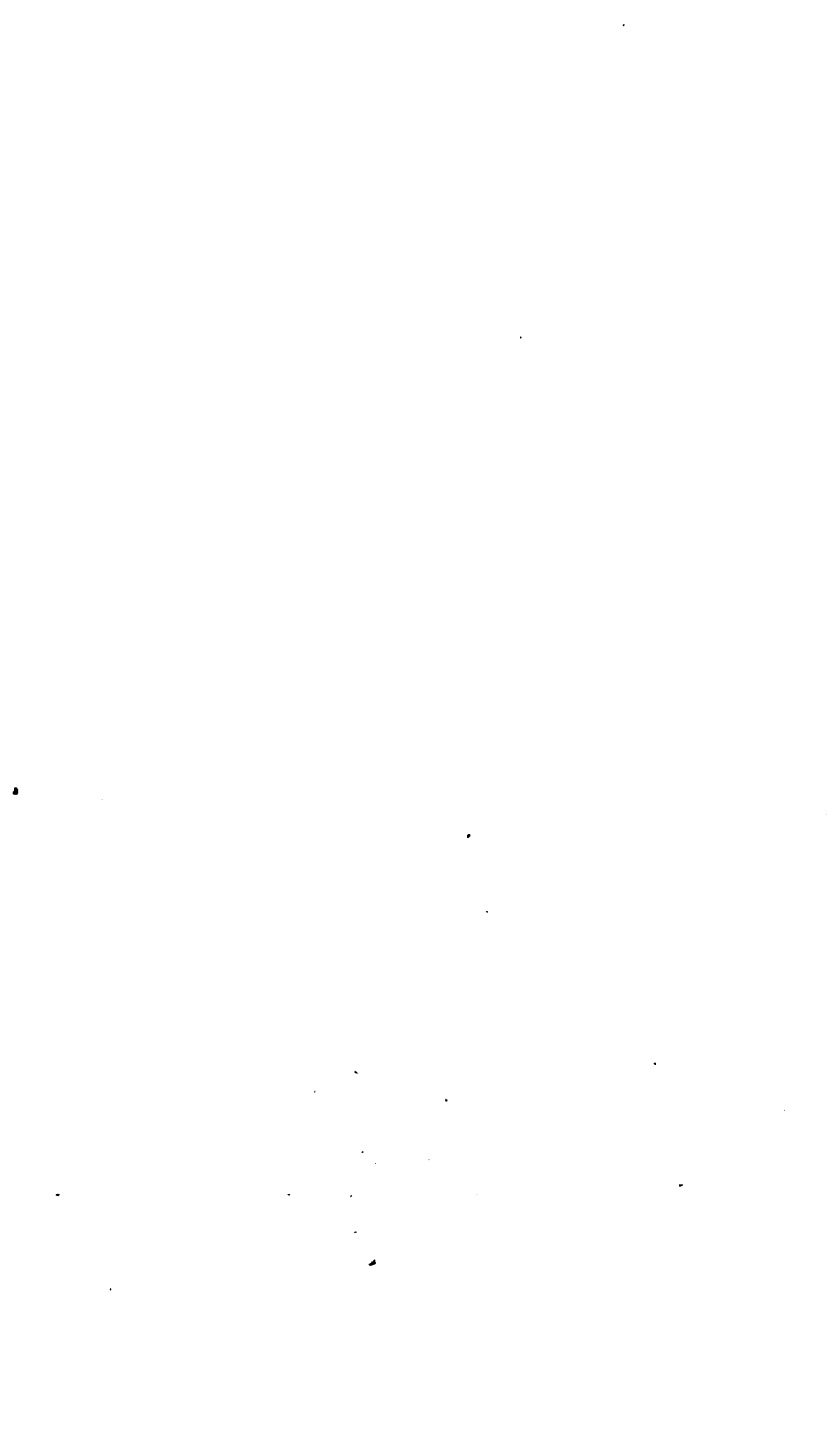
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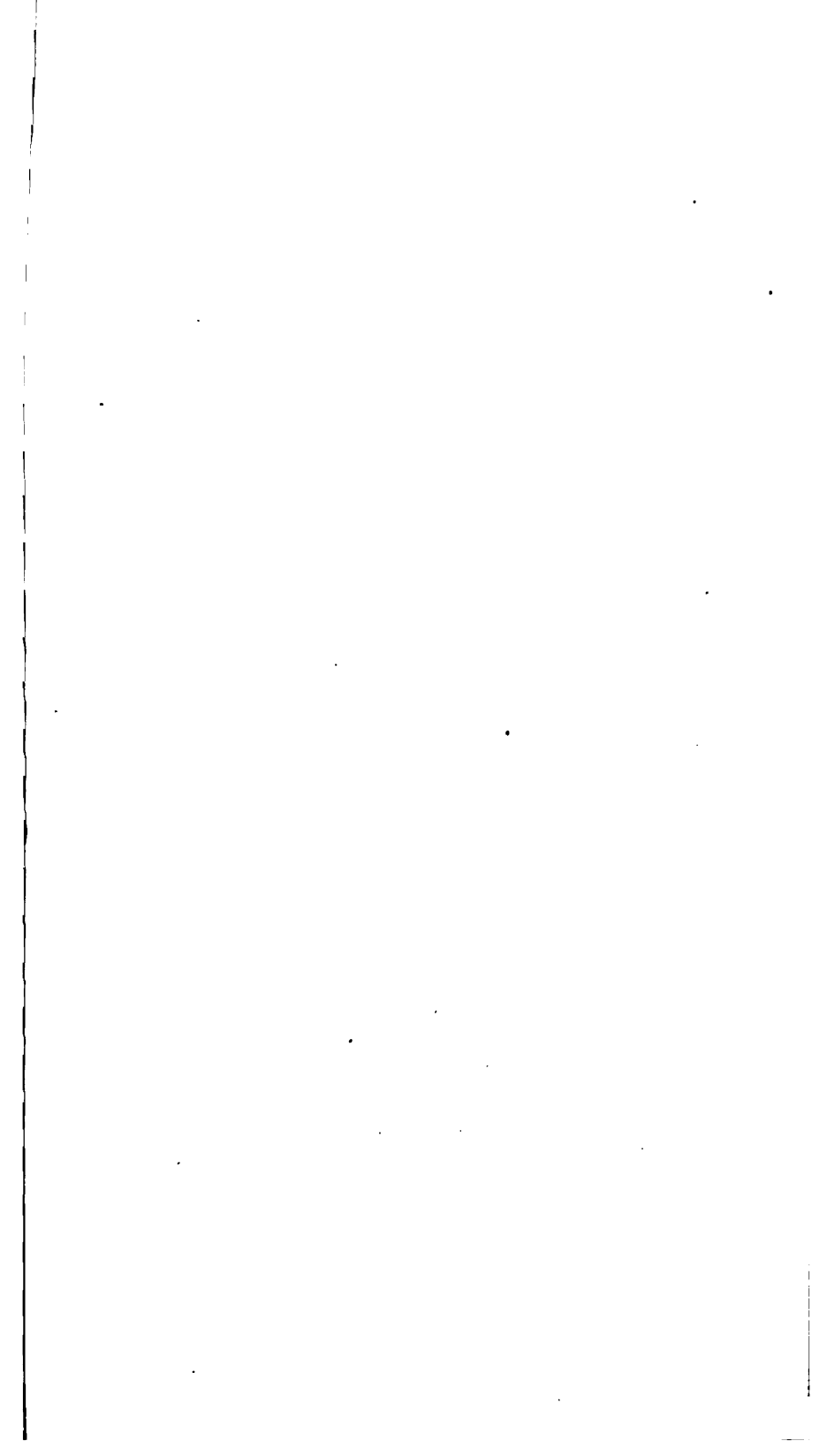


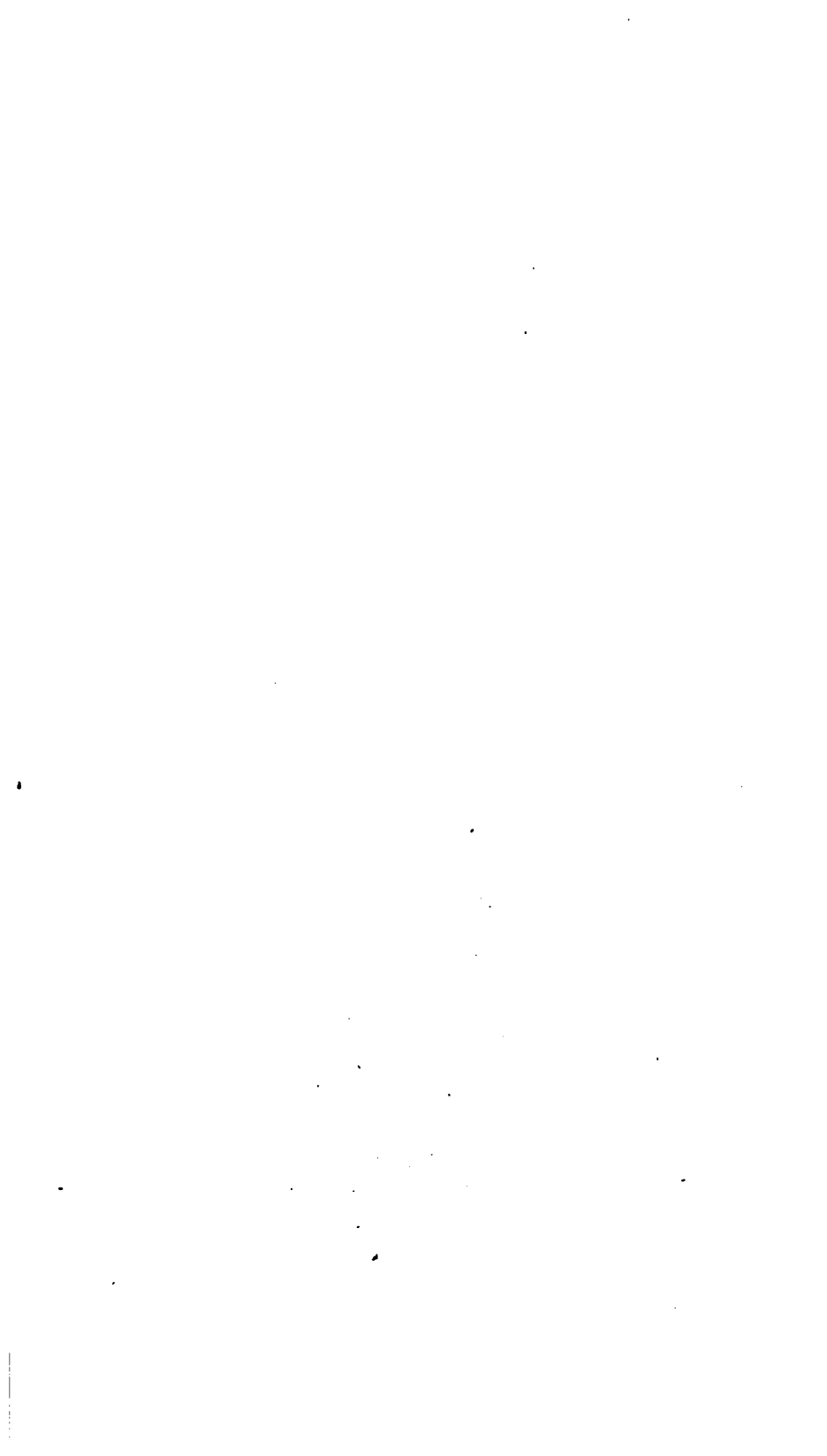
















THE
AMERICAN DECISIONS

CONTAINING THE

CASES OF GENERAL VALUE AND AUTHORITY

DECIDED IN

THE COURTS OF THE SEVERAL STATES

**FROM THE EARLIEST ISSUE OF THE STATE REPORTS TO
THE YEAR 1886.**

COMPILED AND ANNOTATED

By A. C. FREEMAN,

**COUNSELLOR AT LAW, AND AUTHOR OF "TREATISE ON THE LAW OF JUDGMENTS,"
"CO-TENANCY AND PARTITION," "EXEMPTIONS IN CIVIL CASES," ETC.**

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AMERICAN DECISIONS.
VOL. LXXVIII

CASES
IN THE
SUPREME COURT OF ERRORS AND
APPEALS
OF
NEW JERSEY.

SMITH v. ADMINISTRATORS OF SMITH.

[4 DUTCHER, 208.]

ORAL PROMISE TO GIVE OR DEVISE TO SON OF PROMISOR a farm then in possession of the former as tenant of the latter, is within the statute of frauds, and void, although the son, with the assent of the father, erects buildings on the premises, relying upon such promise.

THERE IS IMPLIED PROMISE TO PAY for improvements, where a son, who is the tenant from year to year of his father's estate, expressly refuses to proceed with the improvements till he has his father's promise that the farm shall be his upon his father's death, and the father does not keep his promise.

WHERE PARTY TO AGREEMENT, VOID BY STATUTE OF FRAUDS, fails to execute it, the price advanced, or the value of articles delivered in part performance of the contract, whether in money, labor, or chattels, may be recovered back. In such cases, the law raises, by implication, a promise to pay advances made upon the faith of the contract, and for which no consideration has been paid.

WHERE VENDEE IN POSSESSION UNDER PAROL AGREEMENT for the purchase of lands makes improvements upon the premises, he cannot recover the value of such improvements in an action at law upon the refusal of the vendor to fulfill the contract.

WHERE SON WHO IS TENANT OF HIS FATHER refuses to make improvements until he has his father's promise that upon his death the title to the land shall vest in the son, if the son makes the improvements, but fails to get the title to the land, such improvements inure to the benefit of the estate, but the son may recover the value thereof.

WHERE SON WHO IS TENANT OF HIS FATHER'S ESTATE makes improvements thereon in pursuance of a promise from the father that upon his death the title to the land shall vest in the son, and the father dies without giving such title, neither the vesting of the title to the land, upon which the improvements were erected, in the son as one of the heirs of the in-

testate, nor the assignment of such land to the son under an agreement among the heirs, can be regarded as a performance of the intestate's contract. The son may therefore recover of the estate the value of the improvements erected.

SON MAY RECOVER VALUE OF IMPROVEMENTS ERECTED, where, being the tenant of his father's estate, he makes such improvements under a promise from the father that upon his death the title to the land shall vest in the son; but the father dies without such title vesting in the son, and an agreement among the heirs contemplates an equal division of the intestate's estate among all the heirs, allowing the son no compensation for the improvements more than he would have received as an heir at law, had the improvements been made by him gratuitously, and exclusively for his father's benefit.

THE opinion states the facts.

Depue and Shipman, for the plaintiffs.

Kennedy and Sherrard, for the defendants.

By Court, GREEN, C. J. The contract proved upon the trial of this case, or which the evidence tended to prove, was clearly within the statute of frauds and perjuries. It was a contract for the transfer of an interest in land. The plaintiff, who was tenant from year to year of his father (the defendant's intestate), erected new buildings upon the demised premises, upon the authority of his father, who told the plaintiff "to go on and build, and the farm should be his," or, as another witness testified, "to go on and fix what he had a mind to—he had left it to him." The evidence in the cause would have warranted the jury in finding that the plaintiff erected the buildings with the consent and approbation of his father, upon his express promise that the farm should be his upon his father's death, by deed or devise. The contract to transfer the land, being within the statute of frauds, was void, and cannot form the foundation of an action. The plaintiff, therefore, clearly could not sue upon the special contract.

May the jury lawfully infer a promise to pay for the improvements in money out of the personal estate of the deceased? It is clear, from the evidence, that the erection of the buildings was not a voluntary service, nor a service rendered relying upon the generosity of the intestate to make compensation. The son expressly refused to proceed with the buildings till he had his father's promise that the farm should be his. The case, therefore, does not fall within the familiar principle that no promise can be implied to pay for gratuitous services or services rendered in expectation of a

legacy: *Grandin v. Reading*, 2 Stock. 370; *Johnson v. Hubbell*, Id. 332 [66 Am. Dec. 773]; *Jacobson v. Le Grange*, 3 Johns. 199; *Martin v. Wright*, 13 Wend. 460 [28 Am. Dec. 468]; *Little v. Dawson*, 4 Dall. 111.

But will the law raise an implied promise to pay money when there was an express promise to pay in land? The answer is, that the promise to pay in land was void, and therefore no promise. If the plaintiff had erected the buildings upon the intestate's land at his request, the law would have implied a promise to pay for them. The plaintiff is in no worse situation because the defendant made an express promise to pay for the services in a particular mode, which promise is itself a nullity. The true principle, says Mr. Chief Justice Nelson, is this: "The contract being void and incapable of enforcement in a court of law, the party paying the money or rendering the services in pursuance thereof may treat it as a nullity, and recover the money or the value of the services rendered under the common counts. This is the universal rule in cases where the contract is void for any cause not illegal, if the defendant be in default:" *King v. Brown*, 2 Hill (N. Y.), 486.

The principle seems to be perfectly well settled, and is sustained by very numerous authorities, that where a party to an agreement void by the statute of frauds fails to execute it, the price advanced, or the value of the article delivered in part performance of the contract, whether in money, labor, or chattels may be recovered back: *Mavor v. Pyne*, 3 Bing. 285; *Gray v. Hill*, Ry. & M. 420; *Gillet v. Maynard*, 5 Johns. 85 [4 Am. Dec. 329], and cases cited in note a; *Shute v. Dorr*, 5 Wend. 204; *Lockwood v. Barnes*, 3 Hill (N. Y.), 128 [38 Am. Dec. 620]; *Abbott v. Draper*, 4 Denio, 51.

In all such cases, the law raises, by implication, a promise to repay advances made upon the faith of the contract, and for which no consideration has been paid. If, as a consideration for the improvement, the intestate had agreed to devise to the plaintiff a different tract of land from that upon which the improvement was made, the case would be clear of difficulty. But as the improvement is made upon the farm agreed to be devised, it may be urged that the improvement was made, not for the benefit of the intestate, but for the plaintiff's own benefit, inasmuch as he resided upon the farm during his life, and expected to receive it after his death.

It is true that where the vendee in possession under a parcel

agreement for the purchase of land makes improvements upon the premises, he cannot recover the value of such improvements in an action at law upon the refusal of the vendor to fulfill the contract: *Gillet v. Maynard*, 5 Johns. 85 [4 Am. Dec. 329]; *Shreve v. Grimes*, 4 Litt. 224 [14 Am. Dec. 117].

The improvements in such case are not made at the instance or request of the vendee, nor for his benefit, but for the benefit of the party making them. The law, therefore, will imply no promise by the vendee to pay for them. But this case does not fall within that principle. The plaintiff was not in possession under a contract for the land, but as tenant from year to year paying rent. The improvements inured to the benefit of the intestate. He might, upon the completion of the improvements, have turned the plaintiff out of possession, or demanded and received an increased rent for the premises during his life. He was instrumental in having the improvements made. The plaintiff refused to make them until he had his father's promise that the land should eventually be his. The improvements were not only made by the procurement of the intestate, and for his use, but his estate has actually received the increased value of the improvements made by the money and the labor of the plaintiff. There seems no good reason, either in law or equity, why the jury may not infer a promise to pay for them. If it be objected that the evidence in the cause admits of a different interpretation, and that the terms of the contract were different from those above stated, the answer is, that what is really proved by the evidence was a question of fact, and should have been submitted to the jury.

3. The legal rights of the plaintiff under the contract were in nowise affected by the agreement entered into among the heirs, after the death of John S. Smith, for the settlement of the intestate's estate. It was expressly stipulated that nothing in the agreement should bar or release any claim which either of the heirs might have against the estate.

4. Neither the vesting of the title to the land upon which the buildings were erected in the plaintiff, as one of the heirs at law of the intestate, nor the assignment of a portion of the farm upon which the buildings were erected to the plaintiff under the agreement among the heirs, can be regarded as a performance of the intestate's contract with the plaintiff. The plain sense of the agreement was that the plaintiff should be paid for his improvements; that their value should be added

to his portion of the estate; that he should have the farm and the buildings. The agreement among the heirs contemplates an equal division of the intestate's estate among all the heirs, allowing the plaintiff no compensation whatever for his improvements more than he would have received as an heir at law had the improvements been made by him gratuitously and exclusively for his father's benefit. An allowance, it is true, might have been made in the division of the estate by the commissioners, with the assent of the heirs, to the plaintiff for his improvements. But it is not contemplated in the agreement; and whether made or not, would be a question of fact for the jury.

The verdict should be set aside, and a new trial granted, and the circuit court should be advised accordingly.

PAROL GIFT OF LAND, when within the statute of frauds, where the donee is induced to make improvements by the promise of gift: Note to *Christy v. Barnhart*, 53 Am. Dec. 543, 544.

IMPROVEMENTS MADE BY CHILD on his parent's land, on the promise that the land would be given to him at his father's death, will not take the case out of the statute of frauds: *Poorman v. Kilgore*, 67 Am. Dec. 425, and note 432. But see *Moore v. Pierson*, 71 Id. 409, where specific performance was decreed under such circumstances: See also note to this case 421.

WHEN PARTY MAKING IMPROVEMENTS upon the land of another, his contract of purchase being void because not in writing, can recover the value of such improvements: See *Herring v. Pollard's Ex'rs*, 40 Am. Dec. 653, and note 655; and also *Martin v. Atkinson*, 50 Id. 403.

VENDOR WHEN MAY RECOVER FOR IMPROVEMENTS: See *Jackson v. Loomis*, 15 Am. Dec. 347, and extended note 349; *Richardson v. McKinson*, 12 Id. 303, and note 312; *Craig v. Martin*, 19 Id. 157; *Martin v. Atkinson*, 50 Id. 403; *Bryan v. Loftis*, 39 Id. 242; *McCampbell v. McCampbell*, 15 Id. 48.

VENDOR WHEN NOT ENTITLED TO COMPENSATION FOR IMPROVEMENTS: See *Sesbury v. Stewart*, 58 Am. Dec. 254.

ONE WHO HAS GONE INTO POSSESSION OF LAND under a verbal gift, and made improvements, may recover therefor: *Rucker v. Abell*, 48 Am. Dec. 406.

IMPROVEMENTS WHEN INURE to the benefit of the landlord: *Pomeroy v. Lambeth*, 36 Am. Dec. 33, note 34.

THE PRINCIPAL CASE IS CITED in *Udgate v. Ten Broeck*, 32 N. J. L. 115, 117, to the point that where a son rendered services to his father, under promise that he should be compensated therefor, and the father repudiated the promise, or failed to execute it, the son may recover after the father's death the value of his services, especially where the evidence repels the idea that the services were gratuitous. So where a purchaser pays money on a parol contract to convey lands, which the vendor refuses to carry out, he may recover the money back; and if a tenant puts improvements on lands by permission of his landlord, under a void promise to convey or devise, he may recover therefor, even though he neglects to secure himself by a writ-

ten contract, as required by the statute of frauds: *Freeman v. Headley*, 33 N. J. L. 538, citing the principal case.

WHERE ONE RENDERERS VALUABLE SERVICES to another under a contract void by the statute of frauds, and the party receiving the services refuses to perform his part of the contract, the party rendering the services may treat the contract as a nullity, and recover on the *quantum meruit*: *Buckingham v. Ludham*, 37 N. J. Eq. 140, citing the principal case.

VENDOR WHO UNDER CONTRACT TO PURCHASE puts up a building on the premises in question, and the vendor refuses to execute the conveyance, the vendee cannot, at common law, recover the cost incurred in making such improvement: *Freeman v. Headley*, 32 N. J. L. 231, citing the principal case.

STATE v. CONOVER.

[4 DUTCHER, 224.]

SHERIFF WHO, HAVING EXECUTION against the goods and chattels of one person, levies upon and sells those of another, is not guilty of a breach of the condition of his official bond; and his sureties are not thereby rendered liable.

OFFICIAL ACTS ARE THOSE DONE BY VIRTUE OF OFFICE; such as, if properly done, exculpate both the officer and his sureties from responsibility, but which, if neglected or improperly done, render both liable.

UNOFFICIAL ACTS ARE SUCH AS ARE COMMITTED under color of office, but cannot be lawfully done or justified by the official character of the officer, or by any process in his hands.

IF SHERIFF, HAVING EXECUTION in his hands, seize the property of a stranger, he is a trespasser, and may be sued for the tort in his private capacity; but for such unauthorised act, his sureties are never responsible.

SHERIFF SEIZING PROPERTY OF STRANGER to the execution is a trespasser, and may be resisted. If he calls for assistance, he and his assistants are all trespassers, and may be resisted by force. If the party resisting be indicted for obstructing an officer, it must appear that the officer was acting in his official capacity, with legal process or other authority to do what he was attempting when obstructed, and if it appear that he was acting under color and not by virtue of official authority, the party resisting is not liable, civilly or criminally.

THE opinion states the facts.

Littell and Dayton, for the plaintiffs.

B. F. Randolph, for the defendants.

By Court, GREEN, C. J. General demurrer to the declaration in an action upon a sheriff's bond. The breach assigned is, that Conover, as sheriff of the county of Monmouth, by virtue of executions in his hands against Edmund De Groot, levied upon and sold the goods and chattels of the prosecutors, then in possession of De Groot as bailee, though the said goods were claimed by the prosecutors, and the sheriff forbidden to sell

the same. The declaration also avers that in action of trover brought by the prosecutors against Conover for the recovery of the said goods, the plaintiffs recovered judgment for one thousand and three dollars and thirty-four cents damages, and sixty-three dollars and forty-one cents costs; that an execution against Conover upon the said judgment has been returned unsatisfied, and that by reason thereof an action hath accrued to the plaintiffs to recover against the sureties upon the bond of the sheriff.

Whether the facts stated constitute a breach of the sheriff's bond, for which his sureties are liable, depends upon the terms of the contract.

The condition of the sheriff's bond is that he "shall well and truly execute the office of sheriff, and in all things touching his said office shall well and truly, justly, and faithfully, perform and execute the same:" Nix. Dig. 749, sec. 2.

The statute has clearly indicated the nature of the obligation and the extent of the liability of the sureties, by providing that any person who may be aggrieved "by the neglect, default, malpractice, or misconduct of any sheriff in his office shall be entitled to prosecute the bond, and to relief against the sureties:" Nix. Dig. 761, secs. 11, 12.

By the terms of the statute, "the neglect, default, malpractice, or misconduct of the sheriff in his office" constitute a breach of the bond. If the sheriff, under an execution against A, levy upon the goods of B, the act is not done by virtue of his office. He derived no authority whatever from his office, or from the execution in his hands, to seize the goods of a third party. He had precisely the same right as a private individual to seize the goods as he had when invested with office and armed with legal process. The act was done outside of his office. He acted, it is true, *colore officii*, but not *virtute officii*. In the action brought by the prosecutors against the sheriff for the tort, he was not sued as sheriff, nor was he complained of for any breach of official duty. He was sued simply as an individual for a tort committed by him in his private capacity. And in that action the defendant could not have justified by virtue of his office nor of the process in his hands, nor could his official conduct in any way have been drawn in issue.

If, on the other hand, the sheriff had been sued by the defendant in execution for any abuse in the execution of the writ, the conduct of the sheriff in office would be drawn directly in question, and an absence of official malpractice or misconduct

would have constituted a good defense to the action. In an action by a third party against the sheriff for taking goods by color of the writ, it is immaterial with what motive the sheriff acted. The plaintiff is entitled to recover for the wrong done, whether the sheriff, in the seizure of the goods, acted wantonly and maliciously, or in good faith, under a mistake as to the ownership of the goods. But can an honest mistake as to the ownership of goods, and a *bona fide* act done in consequence of such mistake, constitute malfeasance or misconduct in office? The sheriff is bound in the execution of a writ of *feri facias* to levy upon all the goods of the defendant in execution within his bailiwick. If he neglect or refuse to do so, he is guilty of official misconduct, and his sureties become liable. But if the sheriff can show that he was unable to find the goods of the defendant after diligent inquiry, he is not liable for malfeasance in office, although the plaintiff in execution suffer loss from the omission to levy. The complaint against the sheriff is not that he did not perform his duty, nor that he performed his duty improperly, but that he acted beyond his duty; that he did an act which neither his writ nor his office authorized him to perform, and thereby became liable as a tort-feasor.

The official bond of a constable under our statute, though variant in phraseology, is substantially the same as that of the sheriff. The condition of the bond is, that he shall truly and faithfully perform all the duties enjoined on him as constable: Nix. Dig. 119, sec. 1. If the officer having a *capias* against A should refuse to arrest him, the refusal to make the arrest would clearly violate the condition of the bond, because it would be a failure to perform the duty enjoined on him as constable. But if on the *capias* against A, he arrest and imprison B, though the officer be guilty of a tort, for which B may maintain his action, yet the false imprisonment of B is not a breach of his official bond. The failure of the officer in such case to perform his official duty consists in the failure to arrest the defendant, which it was his duty to do, not in the false imprisonment of a third party, which was entirely without the scope of his official duty or authority.

It is urged that the sheriff was guilty of a breach of official duty, because, after claim of property made by the prosecutors, he did not convene a jury to try the right of property before proceeding to make sale by virtue of his execution. The law does not require the officer to convene a jury to try the right of property. He is required to delay the sale for the space of

ten days, that the claimant may have a jury convened to try his right. But even this he may not do if the plaintiff in execution elect to proceed to a sale; for if the plaintiff, on receiving notice of the trial of the right of property, shall indemnify the sheriff against the demand of the claimant, then he shall suspend any further proceedings in the trial, and proceed to sell: Nix. Dig. 249, secs. 11, 12. For all that appears, the sheriff in this very case may have been indemnified by the plaintiff in execution; and if so, an attempt is now made to convict him of misconduct in office for doing the very thing that the statute imperatively requires he shall do. How can it be official misconduct in an officer to do an act enjoined by the statute as a part of his duty? But this is not all.

The sheriff having in his hands an execution, and finding goods in the possession of the defendant, acts upon the legal presumption that they are his goods, and accordingly makes a levy and return. The goods are subsequently claimed by a third party. The plaintiff in execution indemnifies the sheriff, and the statute directs that he shall thereupon proceed to sell. Now, if the sheriff refuse to sell, he violates his duty and the condition of his bond. If he proceeds to sell, he is equally guilty of a breach of official duty, and renders his sureties liable. Such a result could never have been within the contemplation of the legislature.

This statute has now been in force in New Jersey, under its colonial and state governments, for more than a century. This, so far as we are aware, is the first attempt ever made to hold that torts committed by the sheriff, not in the execution of his office, operated as a breach of his official bond, or rendered his sureties liable. If no reported case can be found to the contrary, it is because it has not been regarded as an open question. Such we believe to have long been the well-settled conviction of the profession as to the true construction of the sheriff's official bond.

It was on this ground mainly that the court upon the argument declined to hear counsel in support of the demurrer. Since the argument, I have carefully examined all the authorities cited in support of the action by the counsel of the plaintiffs, and although some of the state courts have adopted a different view, I find nothing in the reasons advanced to change the conviction which was entertained and expressed by this court on the argument. The question was very elaborately discussed, and numerous authorities cited, in the recent case

of *People v. Schuyler*, 4 N. Y. 173. In that case, the court of appeals, by a divided court, overruled the decision of the supreme court, and held that a seizure of the goods of a third party by the sheriff under an attachment was a malfeasance in office, and a breach of the condition of his official bond. Notwithstanding the respect due to so distinguished a tribunal, I find nothing in the arguments advanced that have created a doubt as to the true construction of our statute.

I am of opinion that the defendant is entitled to judgment upon the demurrer.

HAINES, J. The question presented by the demurrer is, whether a sheriff who, having an execution against the goods and chattels of one person, levies upon and sells those of another, is guilty of a breach of the condition of his official bond, and thereby renders his sureties liable.

The condition of the bond set out in the declaration is in accordance with the provisions of the statute (Nix. Dig. 749, sec. 2), and is that "the said Holmes Conover shall well and truly execute the office of sheriff, and in all things touching his office shall well and truly, justly and faithfully, perform and execute the same, as well in respect to all persons concerned as to the state." The eleventh section of the same act provides that it shall be lawful for the governor, upon application in writing by any person "who may be aggrieved, or suppose himself to be aggrieved, by the default, malpractice, or misconduct of any sheriff, in his office," to order a prosecution of his official bond.

By the terms of the bond and its condition, the sureties became liable for the official acts of the principal. They stipulated that he should well and truly execute the office of sheriff, and that in all things touching his office he would well and truly, justly and faithfully, execute and perform the same; and they are not subject to prosecution, except for some alleged neglect, default, malpractice, or misconduct of the sheriff in his office.

Their liability, then, depends upon the question whether the conversion of the goods of the relators under an execution against another party was an official act. If it was, they are liable; if not, they are not liable, and the demurrer must be allowed.

In examining this question, it may be premised that the liability of sureties is not to be extended by construction, but

to be limited to the terms of the obligation, considered according to their true intent and meaning.

In *People v. Spraker*, 18 Johns. 396, it is said that to render sureties liable, the case must be within the words and plain meaning of the statute. It would be against public policy, as well as against common justice, to prescribe the terms of the bond, and then by construction to extend its obligations beyond the fair intent and plain meaning of those terms.

A man who holds the office of sheriff may do many things which will render himself personally liable, but for which his sureties are not responsible. The sureties do not bind themselves to protect the public against every act of their principal, nor do they become his sureties to keep the peace. And it is necessary to determine what acts of such a person are official, and what not official.

It is a principle, long and well established, that official acts are those which are done by virtue of the office; such as, if properly done, exculpate both the officer and his sureties from responsibility, but which, if neglected or improperly done, render both liable. If the authority is exceeded, or the duty omitted, an action may be maintained against the officer in his official capacity, and his sureties held responsible for it.

Unofficial acts are such as are committed under color of the office, such as cannot be lawfully done and cannot be justified by the official character of the sheriff, or by any process in his hands: *Seeley v. Birdsall*, 15 Johns. 267; *Alcock v. Andrews*, 2 Esp. 542, note; Pratt, J., in *People v. Schuyler*, 4 N. Y. 187.

If a sheriff, having an execution in his hands, seize the property of a stranger, he is a trespasser. He may be resisted, notwithstanding his being a sheriff and having the execution. If he calls for assistance, he and the persons assisting are all trespassers, and may be resisted force by force. If the person resisting be indicted for obstructing an officer in the discharge of his duty, it must appear that the person obstructed was acting in an official capacity, with legal process or other authority to do what he was attempting when so obstructed. If it appear that he was acting under color and not by virtue of official authority, the party resisting is not liable to a civil or criminal prosecution. One acting under color of authority cannot justify the act. He is not acting officially. If sued for the trespass, it is in his private capacity. If he plead authority, and seek to justify, the issue tendered is to try whether he was acting in his private or official capacity. If determined

against him, it is because the act was without authority and extraofficial. Where there is no authority, there is no office, and the act cannot be *virtute officii*. He is as much a trespasser as if he had no writ or were not an officer. He acts, not by virtue of his office, or under any authority conferred by it, but under color or pretense of the office; and it is of no consequence whether he seized the goods by mistake or design, he is equally a trespasser. The question is not whether his intentions were good, but whether his power was sufficient.

For such unauthorized act, the sureties never assumed any responsibility. It was not done in the execution of his office, nor was it anything touching his office. It was no default, malpractice, or misconduct in his office. To say otherwise would require that the condition of the bond be extended beyond the words, and the plain meaning, and clear intent of it. Such appears to me to be the clear result of the inquiry upon principle. For authority, we find no case in point in this state. The absence of any decision of a question so important is persuasive proof that the profession has not regarded the sureties of a sheriff liable under such circumstances.

In England, we find no direct authority, for the obvious reason that sheriffs there are not required to enter into official bond with sureties. They enter into recognizance to the crown for the faithful performance of their duties in regard to the revenue, and to the court of exchequer for the execution of its writs and precepts; but a party aggrieved by any malfeasance has no relief from that source. Sheriffs there are required to be of sufficient freehold ability to meet the claims of all parties injured, and are liable only in suits against themselves or to amercement for neglect of duty.

There are, however, some cases in which the question of what acts are *colore officii* and what *virtute officii* are discussed, and which may aid in this investigation.

The statute of 24 Geo. II., c. 44, sec. 8, provides that an action against a justice, for anything done in the execution of his office, or against any constable acting as aforesaid, shall be brought within six months after the act committed. Under this statute, it was held that a constable who, acting under a warrant commanding him to take the goods of A, took those of B, believing them to belong to A, was entitled to the benefit of the limitation. The court considered that the officer was acting in good faith, and was therefore to be considered within the provision of the statute, which was intended not to deprive

the party injured of his remedy, but to require diligence in pursuing it; and that, being remedial, the provision might be extended by construction to protect an officer acting in good faith: *Parton v. Williams*, 3 Barn. & Ald. 330.

A case more in point is found in 1 Barn. & Ald. 227, *Theobald v. Crichmore*, where a constable, having a warrant of distress to levy a church rate, unlawfully broke and entered the dwelling-house of the plaintiff, who was the defendant in the warrant; and it was held that the officer was acting in pursuance of his authority, and that, although he exceeded it, he was within the statute limiting the time for bringing the action.

So in *Smith v. Wiltshire*, 2 Brod. & B. 619, where constables, under a warrant to search a house for black cloth which had been stolen, took cloth of other colors, and were held to be within the limitation of the statute, they acting under authority, but abusing it.

In *Alcock v. Andrews*, 2 Esp. 542, in a note, Lord Kenyon took the distinction between acts done under color and by virtue of an officer, and said that "it had often been held that a constable acting *colore officii* was not protected by the limitation of the statute of 24 Geo. II., c. 44, when the act was of such a nature that the office gave him no authority to do it, for in doing that act he was not to be considered as an officer; but where a man, doing an act within the limits of his official authority, exercises that authority improperly, or abuses the discretion placed in him, to such cases the statute extends, the distinction being between the extent and the abuse of the authority."

We are referred to the case of *People v. Schuyler*, 4 N. Y. 173, decided in the court of errors of the state of New York, as definitively settling, in that state, the liability of the sureties of a sheriff who seizes the goods of a person not a defendant in the writ.

The reasoning of the majority of the court in that case has failed to satisfy me of the soundness of such a conclusion. It is the opinion of a divided court of five judges against three dissenting. It is not expressive of much confidence in its results. Judge Gardiner, who delivered the opinion of the majority, says: "We are inclined to regard the original taking as a misapplication by the sheriff of the authority of his office, for which his sureties are responsible." The learned judge seems to disregard the distinction between acts done under color and those done by virtue of the office, and does not, I

think, give a proper construction to the authorities to which he refers, and on which he relies. He considered the cases of *Ex parte Reed*, 4 Hill, 573, and *Ex parte Chester*, 5 Id. 555, in conflict with each other; and that when the latter was determined, the liability of sureties under such circumstances was an open question. On an examination of those cases, no conflict appears.

In *Ex parte Reed*, *supra*, application was made to the court for leave to prosecute the official bond of a sheriff, who had taken the goods of the relator under an execution against another, and the court denied the motion on the ground that the seizure of the goods was not *virtute officii*.

In *Ex parte Chester*, *supra*, the court granted leave to prosecute the bond of a sheriff who had made a false return upon an execution by returning *nulla*, notwithstanding the defendant in execution had real and personal property which might have been levied upon.

These cases are entirely harmonious, and recognize the distinction between acts done by virtue of the office and those done under color of it.

The opinion in question seems to rely upon the case of *Skinner v. Phillips*, 4 Mass. 69, as an authority on this point. The *scire facias* in that case recites that the relator had suffered damage by and through the misfeasance and malfeasance of the sheriff in his office, and the court adjudged "that the party injured by the malfeasance of the sheriff or of his deputy is entitled to relief on his bond." What was the nature of the malfeasance, the report does not disclose, but it appears to have been some wrong done by the sheriff in his official capacity, and we have the fair inference that it was done by virtue of his office, and not by color of it. Surely the case is no authority for disregarding that distinction.

The cases of *Archer v. Noble*, 3 Me. 418, and *Harris v. Hanson*, 11 Id. 241, also relied upon in *People v. Schuyler*, 4 N. Y. 173, are directly in point, but they appear to have been decided in part upon the weight of the opinion in *Skinner v. Phillips*, *supra*, which, as has been shown, does not determine that question, and in part on the principle that a sheriff is liable for the acts of his deputy, which is foreign to the subject.

The case of *People v. Schuyler*, *supra*, being the determination of the highest tribunal, may settle the law of New York, but its reasoning, for which alone it can be used here, is not such as to justify us in adopting it as the law of New Jersey.

The opinion of the dissenting judges is, in my judgment, a better exposition of the law, and more in conformity with the true principles of this question, and is also in accordance with the previous decisions of the courts of that state bearing upon it.

In *Seeley v. Birdsall*, 15 Johns. 267, the sheriff was sued for a false return. The statute required that for anything done by virtue of his office, the action must be brought within the county where the act was done; and it was held that the sheriff was entitled to the benefit of the provision of the statute, the act being done by virtue of his office.

The case of *People v. Spraker*, 18 Johns. 396, was an action on a sheriff's bond. The statute requires the liability of the sheriff to be first fixed by a recovery against him for some default or misconduct in office. The relator had proceeded by attachment for contempt against the sheriff for not returning a writ, and the sheriff had made default by not appearing according to the terms of his recognizance, and the court determined that it was not evidence of such misconduct in office as to render the sureties liable. The same principle was recognized in *Morris v. Van Voast*, 19 Wend. 283. The cases of *Ex parte Reed*, 4 Hill, 573, and *Ex parte Chester*, 5 Id. 555, before mentioned, are in accordance with these.

We are also referred, by the counsel of the plaintiff, to other authorities, which were also relied upon in the majority opinion of *People v. Schuyler*, 4 N. Y. 173, namely, *Carmack v. Commonwealth*, 5 Binn. 184; *Forsythe v. Ellis*, 4 J. J. Marsh. 299 [20 Am. Dec. 218], and *Commonwealth v. Stockton*, 5 Mon. 192.

These all, directly or indirectly, hold that the sureties of a sheriff are liable where the goods of one person are taken upon an execution against another.

The principles on which these cases were determined, and the reasoning on which they are founded, differ so widely from what we are accustomed to regard as correct that they can have but little weight here. In the case of *Carmack v. Commonwealth*, 5 Binn. 184, the ground of the liability is chiefly the fact that no property qualification is necessary to render a person eligible to the office of sheriff, and that persons of small property are often elected, and the smallness of their property is apt to excite compassion, and thus promote their election. Hence it is said, "that public policy and public security require a liberal and extended construction of the condition of the recognizance for the faithful performance of the trusts and

duties to his office lawfully pertaining." And reference is also made to the preamble of their statute, as requiring such construction.

In *Forsythe v. Ellis*, 4 J. J. Marsh. 299 [20 Am. Dec. 218], it was held that a sheriff and his sureties were liable to a purchaser of property sold on an execution for defect of title, the sheriff having, on an execution against one man, sold the property of another. Such a principle is not in accordance with the long and well-settled rules of our state, and I see no good reason why we should adopt it here. To hold that a sheriff is liable to a purchaser of property at his sale for defect of title, would, in this latitude, be an amusing novelty.

In *Commonwealth v. Stockton*, 5 Mon. 192, it was distinctly determined that a sheriff's sureties are liable for taking the property of a stranger to the execution; but the opinion is expressly deduced from the principle, that a sheriff is liable for the official acts of his deputy. "It is unquestionably true," remarks Chief Justice Ousley, "that for any illegal act which may be done, either by the sheriff or his deputy, by color of legal process, the sheriff is liable in his official capacity to the person injured, whether that person be a party to the process or a stranger. It is on this principle that actions have been frequently sustained against sheriffs for the acts of their bailiffs in taking, by color of execution, the property of strangers." And hence he reasons that it follows conclusively that, for any abuse of the process of law, the party injured, whether a party to the process or a stranger, is at liberty to sue the sheriff, and may sustain an action on the bond against him and his sureties. Such reasoning does not convince me of the propriety of adopting that as the law of New Jersey.

From every view I can take of the case before us, both on principle and authority, I am satisfied that the seizing of the property of a person not named in the writ is not an official act done by virtue of the office, but unofficial, and done by color of the office, for which the sureties are not liable. And hence the demurrer must be sustained, and judgment rendered for the defendant.

VREDENBURGH and VAN DYKE, JJ., concurred.

LIABILITY OF SURETIES OF SHERIFF for his levy on the property of stranger: See copious note to *Commonwealth v. Cole*, 46 Am. Dec. 514, 515, citing a principal case, but showing that the weight of authority clearly estab-

lishes that the stranger may maintain an action on the officer's bond. Examine this note as to the liability of sureties on sheriffs' bonds generally.

ACTS DONE BY COLOR OF OFFICE, WHAT ARE: See *Burrill v. Acker*, 35 Am. Dec. 582, and note 584.

SHERIFF WHO LEVIES EXECUTION on the goods of a stranger commits a trespass: *Overby v. McGee*, 63 Am. Dec. 49, and note 53, collecting other cases. The sheriff is liable if he seize other property than that of the debtor: *Lathrop v. Arnold*, 43 Id. 256, and note 259.

DECKER v. ADAMS.

[4 DUTCHER, 511.]

WHERE OBLIGOR OF BOND PAYS CERTAIN AMOUNT THEREON under promise that it shall be indorsed as part payment on the bond; but without such indorsement the holder assigns it, and the obligor is obliged to pay the amount of the bond, he cannot recover of the former holder the amount so paid.

BOND CANNOT BE LAWFULLY ASSIGNED FOR MORE than is due upon it, so as to give the assignee any right to demand more than is due. In paying it, therefore, the obligor is entitled to a deduction of any payment which he may have made to a previous holder, whether indorsed upon the bond or not.

HOLDER OF BOND WHO ASSIGNS IT for more than is due thereon is liable to the assignee for the deficiency. The right of action is in the assignee, and is an unassignable right.

THE opinion contains the facts.

Linn, for the plaintiff.

McCarter, for the defendant.

By COURT, WHELPLEY, J. The plaintiff in the court below sued the defendant, in an action of debt, to recover fifty dollars, which he alleged was due to him from Decker, under the following circumstances, set forth in his declaration: that on the first day of April, 1853, the defendant was the holder, by assignment, of a bond, executed by the plaintiff to one John B. Decker, and while he so held the bond by assignment, the plaintiff paid to defendant, on account of said bond, fifty dollars, which the defendant accepted as a payment on said bond, and promised the plaintiff to indorse as a payment thereon; that defendant did not credit or indorse the said payment on the bond, but assigned it without so doing to one Linn, to whom the plaintiff was obliged to pay the amount

due on the bond, without any deduction for the payment so made.

By this declaration, the plaintiff below stated himself out of court. The declaration, clearly and without equivocation, stated that the plaintiff, the obligor of the bond, paid fifty dollars on it, and that the holder received it as a payment. The averment is, that so much was absolutely paid on the bond; that it was absolutely paid *pro tanto*.

The bond could not lawfully be assigned for more than was due upon it, so as to give the assignee any right to demand more than was really due: Nix. Dig. 342. The act making bonds assignable so provides. If, therefore, the declaration be true, the plaintiff could not have been compelled to pay the fifty dollars again.

The complaint in the declaration is not that the plaintiff paid the money to the assignee at the request of the assignor, or for his use and benefit, but that he was compelled to pay it over again, which could not possibly be true. After the money had been paid by him to defendant as a payment on the bond, and had been accepted and received as a payment on the bond by defendant, the plaintiff could not have recovered the money back by suit, because the defendant had not indorsed a receipt upon the bond; that was unnecessary to give legal effect to the payment.

If he could have suffered any damages, and did suffer them on account of the defendant's failure to perform his promise to make the indorsement, he might recover that, but nothing more. The subsequent assignment of the bond could not create a liability to pay back the fifty dollars, which did not exist before.

The action, although in form debt, is in substance case, for damages suffered by the nonfulfillment of the promise to indorse, which the plaintiff could not by any legal possibility have sustained.

If the payment had been made upon a promissory note not yet due, which could have been transferred as a binding security for the whole sum mentioned in it, the case would have been, perhaps, different.

I am unable to perceive any legal ground upon which the recovery can be sustained. It was not, when paid by the plaintiff the second time, paid at the request of defendant; the declaration denies that. It was not, when first paid, so

paid for the use of the plaintiff, but expressly for the use of defendant, who received it for his own use.

The defendant was liable, on his assigning the bond, for more than was due on it, in some form of action to Linn, his assignee, and remained so liable up to the time of the payment of the bond. He could not, by paying Linn money that he was not entitled to receive, get from him a transfer of his right of action to recover the money overpaid. The law gave that right of action to Linn; it was an unassignable right.

The plaintiff's remedy was to defend himself against the suit of Linn; on the bond he had a complete defense: *White v. Ward*, 9 Johns. 232; *Loomis v. Pulver*, Id. 244; *Le Guen v. Gouverneur*, 1 Johns. Cas. 436.

The plaintiff's counsel cited and relied upon several cases, decided in Massachusetts, somewhat anomalous in character. The case of *Fowler v. Shearer*, 7 Mass. 18, if decided on sound principles, which I do not admit, differed from the present case. There, an attorney, having a note for collection, received from the debtor a payment on it, which he did not pay over to the owner of the note; he entered up judgment for the whole amount of the note against the defendant; the debtor sued the attorney who had received the payment. The court permitted a recovery on the ground that he had misapplied the money to his own use, and had no right to retain it against the debtor. That is not the present case.

The case of *Rowe v. Smith*, 16 Mass. 306, is clearly unsound, and cannot be sustained. In that case, a party had made a payment upon his own note to the holder, who afterwards recovered a judgment for the whole amount; the court allowed the judgment debtor to recover back the payment notwithstanding the judgment. Upon the same principle, they might have permitted him to recover back the whole note, on the ground that it was paid. Of what use would a judgment be? What would it settle, if such were the law?

In the case of *Loring v. Mansfield*, 17 Mass. 394, the court, although not overruling *Fowler v. Shearer*, 7 Id. 18, expressly refused to permit an action to be sustained for credits not indorsed upon a note upon which a judgment had been obtained, saying the remedy was in the first action: *Marriott v. Hampton*, 7 T. R. 269; *Hamlet v. Richardson*, 9 Bing. 644; *Brown v. McKinally*, 1 Esp. 279, show that this case is not law.

As the case stated in the pleading of the plaintiff is clearly

intended, it is unnecessary to examine the statement of facts sent up with the *certiorari*.

The judgment must be reversed.

OGDEN, J., concurred.

VREDENBURGH, J., delivered a dissenting opinion.

WHEN BOND IS ASSIGNED, the legal title vests in the assignee; the right of action is in him, and the action must be brought in his name: *Jordan v. Thornton*, 44 Am. Dec. 546.

ASSIGNEE OF BOND holds subject to equities of the maker, at the time of the assignment: *President etc. v. Minor*, 48 Am. Dec. 727.

CASES
IN THE
COURT OF CHANCERY
OF
NEW JERSEY.

KLAPWORTH v. DRESSLER.

[2 BRADLEY'S CHANCERY, 62.]

GRANTEE WHO COVENANTS WITH GRANTOR TO PAY OFF MORTGAGE ON PREMISES becomes in equity the principal debtor with respect to the mortgage debt, and the grantor becomes his surety.

MORTGAGEE MAY HAVE IN FORECLOSURE SUIT DECREE FOR DEFICIENCY AGAINST GRANTEE OF MORTGAGOR, where grantee has covenanted in his deed from the mortgagor to pay off the mortgage.

GRANTEE OF MORTGAGED PREMISES WHO DOES NOT COVENANT TO PAY OFF DEBT takes the premises subject to the incumbrance, but incurs no personal responsibility.

CREDITOR IS ENTITLED TO BENEFIT OF ALL COLLATERAL OBLIGATIONS FOR PAYMENT OF DEBT which surety thereon has received for his indemnity.

BILL to foreclose mortgage filed by Klapworth and wife against Dressler and Ise. The opinion states the case.

Keasby, for the complainants.

Runyon, for the defendants.

By Court, GREEN, Chancellor. It appears by the master's report that the mortgage in question was given by the defendant Dressler, on the eleventh of August, 1853, for the whole purchase-money of the mortgage premises at that time conveyed to him by the complainants. On the first of August, 1854, Dressler conveyed the premises to Ise, the other defendant, by a deed of bargain and sale, stating therein that the premises are sold "subject to a mortgage for three hundred dollars, which Herman Ise does hereby agree and assume to pay, and it is so understood by the parties to these presents."

The master further reports that, in his opinion, the said Herman Ise should be decreed to pay the deficiency (if any) with interest and costs, after applying to the payment of the debt the proceeds of the sale of the mortgaged premises, and to be personally liable to the complainant therefor.

1. Is Ise, the purchaser, liable to the complainant for the deficiency?

2. Can the liability be enforced in this form of proceeding?

The premises are not merely conveyed to the plaintiff subject to the mortgage debt. When this is done, the grantee takes the premises subject to the incumbrance, but incurs no personal responsibility. But the grant is here made upon the specific condition that the grantee agrees and assumes to pay the debt. By the acceptance of the title the clause becomes his covenant, and he thereby becomes bound to the grantor to pay the mortgage debt, and liable to him for any deficiency which may exist upon a sale of the mortgaged premises: *Finley v. Simpson*, 22 N. J. L. 311 [53 Am. Dec. 252], and cases there cited.

Does this liability inure in equity to the complainants? and may it be enforced for their benefit? If the complainants, after a sale of the mortgaged premises, should enforce payment of the balance by an action at law against Dressler upon his bond, it is clear that he would have his remedy over against Ise. May the complainants have their remedy in equity directly against Ise when Dressler is insolvent, or no remedy can be had against him personally?

Where a grantee in a deed covenants with the grantor to pay off an incumbrance subsisting upon the premises, if the grantor is personally liable for the payment of the incumbrance, the grantee, by virtue of the agreement, is regarded in equity as the principal debtor, and the grantor as a surety only. And it is also a principle in equity, that "a creditor is entitled to the benefit of all collateral obligations for the payment of the debt, which a person standing in the situation of a surety for others has received for his indemnity, and to relieve him or his property from liability for such payment:" *Curtis v. Tyler*, 9 Paige, 432; *Halsey v. Reed*, Id. 446; *King v. Whitely*, 10 Id. 465; *Blyer v. Monholland*, 2 Sandf. Ch. 478; *Rawson v. Copland*, Id. 251; *Trotter v. Hughes*, 12 N. Y. 74 [62 Am. Dec. 137].

These cases fully establish the principles above stated, and recognize their application to a case like that now before the

court. The case of *Blyer v. Monholland*, 2 Sandf. Ch. 478, is directly in point. Adopting and applying these principles, they control the present case.

Dressler is legally liable to the complainant for the payment of the complainant's mortgage. Ise has covenanted with Dressler to pay the debt, and is eventually liable. It is a part of the price which he was to pay for the premises. Whether the covenant bound him to pay the debt to Dressler, or directly to the complainants, is in equity immaterial. The effect of this arrangement made Dressler in equity the surety of Ise in respect of the mortgage debt to the complainants. The obligation inured in equity to their benefit. This result is perfectly equitable and just, as between all the parties. The debt is justly due and owing to the complainants. Ise is, by the terms of his deed, bound to pay it. It is a part of the price of the land to which he holds the title. Dressler is not in equity liable for the debt. He has no interest in the land. He parted with his interest to Ise, and as a part of the price, received his covenant to pay this debt. In equity, the debt is the debt of Ise, and Dressler the mere security. If Dressler should be compelled to pay, he would have recourse over immediately to Ise. If, therefore, Dressler were able and willing to pay the debt, the decree against Ise is in accordance with equity. But the bill charges, and the master reports, that Dressler is insolvent, and if this relief is denied the complainants, the result will be that the complainants lose their debt, and Ise requires title to the land without paying the price which he covenanted to pay. I cannot doubt that a decree against Ise, as prayed for in the bill of complaint, is in strict accordance with the principles of equity.

It remains to be considered whether the complainants are entitled to such relief upon a bill to foreclose.

In New York, on a bill filed for the satisfaction of a mortgage, it is the practice to decree payment by the mortgagor, or by any other person who may have become security for the payment of the debt, of the balance of the debt remaining unsatisfied after a sale of the mortgaged premises. This is done, however, by virtue of the express provisions of their statute: 2 R. S. 191, secs. 152, 154 (1829).

Independent of statutory provision, the rule of equity is, that a bill to foreclose is in the nature of a proceeding *in rem*, and the party is confined in his remedy to the pledge. The suit is not intended to act *in personam*: *Dunkley v. Van Buren*, 8 Johns. Ch. 331.

In this case, the bill was filed to foreclose a mortgage given to secure the payment of a bond. The bill, in form, was an ordinary foreclosure bill. The complainant applied for a decree directing the mortgagor, in case of a deficiency upon the sale of the mortgaged premises, to pay the remainder of the debt. It was ruled that his proper remedy was at law upon the bond: *Hunt v. Lewin*, 4 Stew. & P. 138.

But if the bond be lost, or if there be other special circumstances which, independently of the mortgage, give the court jurisdiction over the demand, a decree against the mortgagor will be made for the balance of the debt remaining unsatisfied by a sale under the mortgage: *Green v. Crockett*, 2 Dev. & B. Eq. 390; *Crutchfield v. Coke*, 6 J. J. Marsh. 89.

In this case, the complainant has no remedy whatever at law against Ise. The claim is purely equitable, and must be enforced, if at all, in a court of equity. The bill is framed with a view to this form of remedy, and prays for this specific relief. It charges that Ise is responsible for the debt. He has had a full opportunity of answering. Under these circumstances, there is no reason why he should not be decreed to pay the debt under the bill.

THE PRINCIPAL CASE IS CITED to the point that where a purchaser from a mortgagor covenants to pay the mortgage debt he becomes the principal debtor, and the mortgagor becomes a surety thereon, and the mortgagee may enforce the purchaser's obligation to the extent of the deficiency, in a suit to foreclose: *Hoy v. Bramhall*, 19 N. J. Eq. 570; *Jarman v. Winwall*, 24 Id. 269; *Stiger v. Mahone*, Id. 430; *Pruden v. Williams*, 26 Id. 211; *Huyler's Ex'rs v. Atwood*, Id. 506; *Crowell v. Hospital*, 27 Id. 655, 656; *Younge v. Trustees*, 31 Id. 299; *Newark Savings Institution v. Forman*, 33 Id. 440. It is also cited to the point that the right of the mortgagee to hold such grantee for the deficiency does not rest upon the theory of a contract between the purchaser and the mortgagee, but stands exclusively, according to an almost unbroken line of adjudications, on the ground that the covenant of the purchaser is a collateral security obtained by the mortgagor, which, by equitable subrogation, inures to the benefit of the mortgagee: *Crowell v. Carrier*, 24 N. J. Eq. 154; *Norwood v. De Hart*, 30 Id. 414; *Mount v. Van Ness*, 33 Id. 265; *Coffin v. Adams*, 131 Mass. 137. A mortgagee seeking to enforce a liability against the grantee of the mortgagor stands merely in the right of his debtor, and unless his debtor could enforce the covenant, he cannot: *Wise v. Fuller*, 29 N. J. Eq. 261, citing the principal case. An assumption of a mortgage contained in a deed made to a married woman without her knowledge or consent, and never delivered to her, does not bind her: *Culver v. Badger*, Id. 76, citing the principal case.

PERSONAL LIABILITY OF GRANTEE OF LAND TO PAY OFF PRIOR MORTGAGE—ASSUMPTION OF MORTGAGE.—A grantee of land which is subject to a mortgage assumes no personal liability for a deficiency upon the foreclosure of the mortgage, except where by express agreement he has undertaken to

pay the mortgage debt: *Ritchie v. McDuffie*, 62 Iowa, 46; *Banks's Appeal*, 13 Rep. 641 (U. S. C. C.); *Fiske v. Tobnan*, 124 Mass. 254; *Strong v. Converse*, 8 Allen, 557; *Rourke v. Colton*, 4 Bradw. 259; *Hall v. Mobile & Montgomery R'y Co.*, 58 Ala. 10; *Merriman v. Moore*, 90 Pa. St. 78. A purchaser of a mere equity of redemption is liable neither legally nor equitably to indemnify his grantor against the mortgage: *Smith v. Truslow*, 84 N. Y. 660. Upon a conveyance by the mortgagor, not subject to the payment of the mortgage, the mortgagor remains the principal debtor, and the land is simply security for the debt: *Wadsworth v. Lyon*, 93 Id. 201; S. C., 45 Am. Rep. 190; *Johnson v. Monell*, 13 Iowa, 300; *Tichenor v. Dodd*, 18 N. J. Eq. 454. The personal estate of deceased grantee of mortgaged land is not subject to the payment of the mortgage, unless he has made the debt his personal debt by the provisions of his will or by agreement with the mortgagee. An indemnity given to the mortgagor, coupled with the payment of part of the debt, will not have that effect: *Cumberland v. Codrington*, 3 Johns. Ch. 229; S. C., 8 Am. Dec. 492. And in *Mount v. Van Ness*, 33 N. J. Eq. 282, it is held that an assumption by an ancestor of a mortgage on land purchased by him does not entitle the heir to whom the premises descend to exoneration out of the personal estate for the amount of the mortgage.

EFFECT OF ASSUMPTION OF MORTGAGE BY GRANTEE: See note to *Trotter v. Hughes*, 62 Am. Dec. 141.

LIABILITY TO MORTGAGEE.—When upon the conveyance of the mortgaged premises, by the mortgagor, the grantee assumes and agrees to pay the mortgage, he becomes at least as to the mortgagor the principal debtor and the mortgagor occupies the position of surety: The principal case; *Stiger v. Mahone*, 24 N. J. Eq. 426; *Hoy v. Bramhall*, 19 Id. 578; *Huyler's Ex'rs v. Atwood*, 26 Id. 504; *Russell v. Pistor*, 7 N. Y. 171; *Calvo v. Davies*, 8 Hun, 222; S. C., 73 N. Y. 215; *Thorp v. Leokuk Coal Co.*, 48 Id. 253; *Marshall v. Davies*, 78 Id. 414; S. C., 58 How. Pr. 231; *Mutual Life Ins. Co. v. Davies*, 44 N. Y. Super. Ct. 172; *Comstock v. Drohan*, 8 Id. 373; S. C., 71 N. Y. 9; *Atlantic Dock Co. v. Leavitt*, 54 Id. 35; *Trotter v. Hughes*, 12 Id. 74; S. C., 62 Am. Dec. 137; *Belmont v. Concan*, 22 N. Y. 438; *Burr v. Beers*, 24 Id. 178; *Ayers v. Dixon*, 78 Id. 318; *Wales v. Sherwood*, 52 How. Pr. 413; *Fleishhauer v. Doellner*, 9 Abb. N. C. 373; *Cornell v. Prescott*, 2 Barb. 16; *Rubens v. Prindle*, 44 Barb. 336; *Johnson v. Zink*, 52 Id. 396; *Marsh v. Pike*, 10 Paige, 595, 596; *Boardman v. Lorrabee*, 51 Conn. 39; *Wilson v. Burton*, 52 Vt. 394; *Crenshaw v. Thackston*, 14 S. C. 437; *Flagg v. Geltmacher*, 98 Ill. 293; *Ellis v. Johnson*, 96 Ind. 377; *George v. Andrews*, 60 Md. 26; *Corbett v. Waterman*, 11 Iowa, 86; *Mills v. Watson*, 1 Sweeny, 374; *Osborne v. Cabell*, 77 Va. 462. The grantee is not only liable to his grantor on this agreement, but also in equity personally liable to the mortgagee for the mortgage debt, and subject to personal judgment for a deficiency upon foreclosure: The principal case; *Russell v. Pistor*, 7 N. Y. 171; *Halley v. Reed*, 9 Paige, 446; *Ferris v. Crawford*, 2 Denio, 595; *Blyer v. Monholland*, 2 Sandf. Ch. 478; *Curtis v. Tyler*, 9 Paige, 432, 435; *King v. Whitely*, 10 Id. 465; *Burr v. Beers*, 24 N. Y. 178; *Hoff's Appeal*, 24 Pa. St. 200; *Lennig's Estate*, 52 Id. 135, 138; *Crawford v. Edwards*, 33 Mich. 354; *Unger v. Smith*, 44 Id. 22; *Gage v. Jenkinson*, 24 N. W. Rep. 815 (Mich.), citing prior cases; *Corbett v. Waterman*, 11 Iowa, 86; *Thompson v. Bertram*, 14 Id. 476; *Rapp v. Stoner*, 104 Ill. 618; *Thompson v. Dearborn*, 107 Id. 187; *Daub v. Englebach*, 109 Id. 267; *Ellis v. Johnson*, 96 Ind. 377; *Palmer v. Carey*, 19 Rep. 318 (Wis.); *Stiger v. Mahone*, 24 N. J. Eq. 426; *Converse v. Cook*, 8 Vt. 164. A grantee who in his deed has promised to pay the negotiable note of his grantor, secured by a trust deed of the land conveyed, is liable to the

holder of the note, though the note was not received by the holder until after the making of the promise: *Fitzgerald v. Barker*, 13 Mo. App. 192. An assignee of a leasehold, by assuming a mortgage upon it, becomes personally the debtor of the mortgagee: *Re Muller*, 3 Demarest, 266.

The mortgagee may, however, treat both the grantor and grantee as principal debtors, and may have a personal decree against both: *Corbett v. Waterman*, 11 Iowa, 86; *Thompson v. Bertram*, 14 Id. 476; *James v. Day*, 37 Id. 164; *Herbert v. Doussan*, 8 La. Ann. 267; *Waters v. Hubbard*, 44 Conn. 340; *Burr v. Beers*, 24 N. Y. 178. The transaction is not an undertaking to pay the debt of a third person, but is an original undertaking: *Ely v. McKnight*, 30 How. Pr. 97; *Fish v. Dodge*, 4 Denio, 311; *Murray v. Smith*, 1 Duer, 412; see *Townsend v. Ward*, 27 Conn. 610. The purchaser, as he has made the mortgage debt his own debt, cannot take an assignment of the mortgage and hold it as an independent title, but it is thereupon merged and discharged: *Mills v. Watson*, 1 Sweeny, 374; *Tilly v. Palmer*, 51 Ill. 331; *Jumel v. Jumel*, 7 Paige, 591; *Gayle v. Wilson*, 30 Gratt. 166. So where one has assumed the payment of two mortgages upon the premises conveyed to him, he cannot by taking an assignment of the first mortgage defend against the second: *Converse v. Cook*, 8 Vt. 164. If a senior mortgagee purchases the mortgaged premises and assumes the payment of a junior mortgage, his own mortgage is merged and discharged and the junior mortgage takes precedence: *Fowler v. Fay*, 62 Ill. 375. One who has assumed the payment of a mortgage cannot defend against a claim of dower by the widow of the grantor, by setting up an assignment of the mortgage to himself upon payment of the amount due, she having joined to release dower in the mortgage, but not in the deed to him: *McCabe v. Swap*, 14 Allen, 188. The land is subject to the mortgage, notwithstanding a covenant of warranty: *State v. Davis*, 96 Ind. 539.

RELEASE OF COVENANT OF ASSUMPTION BY GRANTOR AND GRANTEE.—The contract by the grantee to assume and pay the mortgage debt may be released by the grantor at any time before foreclosure, and before the contract has come to the notice of and been accepted by the mortgagee. After such acceptance, the mortgagee becomes a party to the agreement intended for his benefit, and the agreement cannot be released by the grantor: *Kelly v. Roberts*, 40 N. Y. 432; *Whiting v. Gearty*, 14 Hun, 498; *Berkshire Life Ins. Co. v. Hutchings*, 100 Ind. 496; *Younge v. Trustees*, 31 N. J. Eq. 290; see also *Stephens v. Casbacker*, 8 Hun, 116; *Simson v. Brown*, 6 Id. 251; *Douglass v. Wells*, 18 Id. 88. In the absence of such notice and acceptance, the grantor may release the obligation: *Kelly v. Roberts*, 40 N. Y. 432; *Gilbert v. Sanderson*, 56 Iowa, 349; S. C., 41 Am. Rep. 103; *Berkshire Life Ins. Co. v. Hutchings*, 100 Ind. 496. It is also held that the contract of assumption may be released by the grantor at any time before the institution of a foreclosure suit: *Biddel v. Brimolara*, 64 Cal. 354; see *Crowell v. Hospital*, 27 N. J. Eq. 650; *O'Neill v. Clark*, 33 Id. 444. A holder of a mortgage is not entitled to a decree for deficiency against a purchaser of the mortgaged premises by virtue of his contract of assumption of the mortgage, where, before the mortgage fell due, the purchaser reconveyed to the mortgagor who, by his deed, assumed the mortgage, the holder of the mortgage having become the owner of it before the covenant of assumption without reliance upon it as part of his security, and his conduct not appearing to have been in any degree influenced by it: *Crowell v. Currier*, 27 N. J. Eq. 152; *Crowell v. Hospital*, Id. 650; *Laing v. Byrne*, 34 Id. 52.

A release by the grantor may be avoided on the ground of fraud. A voluntary release by the grantor of the covenant of assumption made without con-

sideration in anticipation of bill filed, and for the express purpose of releasing the grantee from liability for deficiency, will not for that reason be invalid. It will be invalid however if the grantor be insolvent, and the effect of the release is to hinder or defraud creditors by depriving them of the means which the debtor had in his power to make available for the payment of debts: *Younge v. Trustees*, 31 N. J. Eq. 290; *Trustees v. Anderson*, 30 Id. 366. Where the mortgagee, on bill to foreclose, seeks to avoid a release by the mortgagor of the covenant of assumption on the ground of fraud, the bill should be framed in that aspect, and make an issue on the fraud: *Id.*

Where the payment of a prior mortgage is assumed in a subsequent one, the prior mortgage cannot take advantage of this agreement after the second mortgage is paid and discharged: *Garnsey v. Rogers*, 47 N. Y. 233; S. C., 7 Am. Rep. 440. If a mortgagor sells part of the land covered by a mortgage duly recorded, and transfers the notes of the vendee for the purchase-money to the mortgage creditor, to be applied to the reduction of the mortgage debt, the payment of such notes by the vendee does not release the land thus sold from the mortgage, unless it was so agreed between the vendee and the parties to the mortgage: *Colby v. Cato*, 47 Ala. 247.

EXTENSION OF TIME GIVEN TO GRANTEE BY MORTGAGEE DISCHARGES MORTGAGOR, BUT GIVEN TO MORTGAGOR DOES NOT DISCHARGE GRANTEE. As a corollary of the rule that the assumption of the mortgage makes the grantee the principal and the mortgagor a surety, it follows that an extension of time of payment given by the holder of the mortgage to the grantee, even with the express understanding that the bond and mortgage shall remain in every other respect unaffected by the agreement of extension, when made without the consent of the mortgagor, discharges him from all liability upon the mortgage: *Calvo v. Davies*, 8 Hun, 222; S. C., 73 N. Y. 215; *Paine v. Jones*, 14 Hun, 577; *Fisk v. Hayward*, 28 Id. 456; *Christner v. Brown*, 16 Iowa, 130; *Grover v. Fox*, 36 Mich. 473; *George v. Andrews*, 60 Md. 26; S. C., 45 Am. Rep. 706. But see *Connecticut Mut. Life Ins. Co. v. Mayer*, 8 Mo. App. 18; *Boardman v. Larrabee*, 51 Conn. 39. The surety will not be affected by any reservation contained in such an agreement, unless he consented to it: *Calvo v. Davies*, *supra*; *Murray v. Marshall*, 94 N. Y. 611. But the grantee of the mortgage is not to be regarded as the surety of his grantor respecting the mortgage debt, and an extension of time given by the mortgagee to the mortgagor does not release or discharge the lien of the mortgage in favor of the grantee: *Maher v. Lanforn*, 86 Ill. 513; *Kuhns v. McGeah*, 38 Ohio St. 468; see *Fry v. Sheker*, 55 Ga. 208, 217. The mortgagee may release the mortgagor from his personal liability without discharging the land, or the grantee who has assumed the debt: *Tripp v. Vincent*, 3 Barb. Ch. 613.

ENFORCEMENT BY MORTGAGEE OF GRANTEE'S OBLIGATION.—Right of Subrogation.—The ground upon which is based the right of the mortgagee to take direct advantage of the grantee's assumption of the payment of the mortgage is generally held to be that since, as between the parties to the deed, the grantee becomes by his contract of assumption the principal debtor and the grantor the surety, the mortgagee is entitled to the benefit of this contract, though he was not aware of its existence till long afterwards, upon the familiar principle that a creditor is entitled by equitable subrogation to all securities held by a surety of the principal debtor. A court of equity having all the parties before it to prevent circuity of action will adjust the rights of all parties: *Haley v. Reed*, 9 Paige, 446; *Curtis v. Tyler*, Id. 432; *King v. Whitely*, 10 Id. 465; *Marsh v. Pike*, Id. 595; *Cornell v. Prescott*, 2 Barb. 16; *Russell v. Pistor*, 7 N. Y. 171; *Douglass v. Wells*, 18 Hun, 88, 95;

Oakman v. Henry, 55 How. Pr. 234; the principal case; *Crowell v. Currier*, 27 N. J. Eq. 152; *Crowell v. Hospital*, Id. 650; *Norwood v. De Hart*, 30 Id. 412; *Biddel v. Brinsolara*, 64 Cal. 354; *Osborne v. Cabell*, 77 Va. 462.

Grantor must be Personally Liable. To support the mortgagee's suit upon this ground, the grantor must have been personally liable for the payment of the mortgage. If the grantor is not personally liable, either legally or equitably, upon the mortgage, as for example if he be not the mortgagor or one who has bound himself personally to the payment of the mortgage, then the mortgagee's right against the grantee on his promise of assumption which rests primarily upon the personal liability of the grantor fails, and the grantee is not personally liable through the grantor to the holder of the mortgage, and subject to a deficiency judgment on foreclosure: *Norwood v. De Hart*, 30 N. J. Eq. 414; *Mount v. Van Ness*, 33 Id. 265; *Wise v. Fuller*, 29 Id. 261; *Vrooman v. Turner*, 69 N. Y. 280; *Dunning v. Leavitt*, 85 Id. 35; S. C., 39 Am. Rep. 617; *Lawrence v. Fox*, 20 N. Y. 268; *King v. Whitely*, 10 Paige, 465; *Trotter v. Hughes*, 12 N. Y. 74; S. C., 62 Am. Dec. 137; *Moore's Appeal*, 88 Pa. St. 450. So also it is equally necessary that the grantee's obligation should be effectual and binding; for as the mortgagee's right rests upon his equity to be subrogated to the collateral securities obtained by the mortgagor, he can, therefore, have a personal judgment against the purchaser for the debt only when the mortgagor holds an obligation which will support such judgment: *Crowell v. Currier*, 27 N. J. Eq. 152; *Crowell v. Hospital*, Id. 650; *Norwood v. De Hart*, 30 Id. 412.

What constitutes an effective obligation: See *infra*, "Contract of Assumption, Form of." Where these prerequisites are lacking, there is no opportunity for equitable subrogation, and the agreement is regarded as a mere declaration that the property conveyed is subject to the lien of the mortgage: *King v. Whitely*, 10 Paige, 465; *Trotter v. Hughes*, 12 N. Y. 74; see *Thorpe v. Keokuk Coal Co.*, 48 Id. 253.

This right of the mortgagee to take advantage of the grantee's assumption is commonly enforced by making the grantee a party to the bill to foreclose, and praying a personal decree for the deficiency against him: *Ross v. Kennison*, 38 Iowa, 396; *Ream v. Jack*, 44 Id. 325; *Johnson v. Harder*, 45 Id. 677; *Anthony v. Herman*, 14 Kan. 494; *Schmucker v. Sibert*, 18 Id. 104; *Miller v. Thompson*, 34 Mich. 10; *Bull v. Titworth*, 29 N. J. Eq. 73; *Crowell v. Hospital*, 27 Id. 650; *Rogers v. Herron*, 92 Ill. 583.

Third Person may Maintain Action on Promise Made for his Benefit. Upon this ground, in many states, is based the right of the holder of the mortgage to take advantage of the assumption of the mortgage by the grantee of the mortgagor: *Lawrence v. Fox*, 20 N. Y. 268; *Burr v. Beers*, 24 Id. 178; *Garnsey v. Rogers*, 47 Id. 233; S. C., 7 Am. Rep. 440; *Campbell v. Smith*, 71 N. Y. 26; *Miller v. Winchell*, 70 Id. 437; *Hand v. Kennedy*, 83 Id. 149; S. C., 45 Super. Ct. 385; *Pike v. Seiter*, 15 Hun, 402; *Douglass v. Wells*, 18 Id. 88; *Cumberland v. Codrington*, 3 Johns. Ch. 229; S. C., 8 Am. Dec. 492, 495; *Ross v. Kennison*, 38 Iowa, 396; *Gilbert v. Sanderson*, 56 Id. 349; S. C., 41 Am. Rep. 103; *Scott v. Gill*, 19 Iowa, 187; *Thompson v. Bertram*, 14 Id. 476; *Corbett v. Waterman*, 11 Id. 86, 87; *Moses v. Dallas Dist. Ct.*, 12 Id. 139; *Lamb v. Tucker*, 42 Id. 118; *Center v. McQuesten*, 24 Kan. 480; *Comstock v. Hitt*, 37 Ill. 542; *Thompson v. Dearborn*, 107 Id. 87; *Dean v. Walker*, Id. 540; S. C., 47 Am. Rep. 467; *Twichell v. Mears*, 8 Biss. 211 (U. S. C. C., Ill.); *Fitzgerald v. Barker*, 70 Mo. 685; *Hein v. Vogel*, 69 Id. 529; *Osborne v. Cabell*, 77 Va. 462; *McDowell v. Laer*, 35 Wis. 171; *Bassett v. Hughes*, 43 Id. 319. The mortgagee, in adopting the transaction made for his benefit, is brought into

privity with the promisor, and may enforce the promise as though it were made directly to him: *Thorp v. Keokuk Coal Co.*, 48 N. Y. 253; *Lawrence v. Fox*, 20 Id. 268; *Campbell v. Smith*, 8 Hun, 6. It is not necessary that there should be any consideration passing from the third person, i. e., the mortgagee; the promise is supported by the consideration passing from the mortgagor: *Id.* It is, however, essential to a recovery upon this theory that the plaintiff should have, at the time of the promise, some relation to or interest in the lands: *Miller v. Winchell*, 70 N. Y. 437. One who acquires an interest in the lands, after the promise of assumption is made, cannot claim that it was made for his benefit: *Id.* A mere stranger cannot claim the benefit of an agreement between the grantor and grantee; to entitle a third person to such a benefit, there must be either a new consideration or some prior right or claim against one of the contracting parties, by which he has a legal interest in the performance of the agreement: *Vrooman v. Turner*, 69 N. Y. 284; *Cashman v. Henry*, 55 How. Pr. 234; S. C., 75 N. Y. 103. A subsequent assignee of the mortgage, however, stands in the place of the mortgagee, and has the same rights against purchasers who have assumed the mortgage: *Smith v. Ostermeyer*, 68 Ind. 432. A covenant in a deed absolute, but intended as a mortgage, by which the grantee assumes and agrees to pay a prior mortgage, gives no right of action against the grantee to the holder of the mortgage, as he is neither a party to the contract, nor the one for whose benefit it was made: *Root v. Wright*, 84 N. Y. 72; *Pardoe v. Treat*, 82 Id. 385.

Grantor must be Personally Liable under This Theory, as well as under the former one. Thus a covenant of assumption, made by one to whom the premises were conveyed after several meane conveyances have intervened since the conveyance by the mortgagor, cannot be enforced by the holder of the mortgage, unless the grantor of such covenantor had himself assumed the mortgage debt, or made himself personally liable for it by some means: *Vrooman v. Turner*, 69 N. Y. 280, reversing 8 Hun, 78, and virtually overruling *Real Estate etc. v. Balch*, 45 N. Y. Super. Ct. 528, decided on the authority of 8 Hun, 78; *Dunning v. Leavitt*, 85 N. Y. 35; S. C., 39 Am. Rep. 617; see *Johnson v. Harder*, 45 Iowa, 677. But in Pennsylvania the purchaser is liable upon his assumption, although the covenant be in a deed from a grantor who was under no liability to pay the mortgage: *Merriman v. Moore*, 90 Pa. St. 78, 81. So in Illinois: *Dean v. Walker*, 107 Ill. 540; S. C., 47 Am. Rep. 467.

Direct Enforcement by Mortgagee of Grantee's Contract of Assumption is in Equity. In New York, the mortgagee may sue the grantee personally on his contract of assumption without first resorting to a foreclosure suit, even though the mortgage bond provides that recourse shall first be had to the land: *Thorp v. Keokuk Coal Co.*, 48 N. Y. 253; S. C., 47 Barb. 439; *Burr v. Beers*, 24 N. Y. 178; *King v. Whitely*, 10 Paige, 465. But ordinarily, the rule is that the mortgagee cannot sue directly at law upon this promise, which, though it may be regarded as made for his benefit ultimately, is primarily for the benefit of the grantor, and as there is no novation, the grantor has his action against the grantee for his own indemnity, and the promisor would thus be liable to two separate actions. The rule has been maintained, therefore, that the original creditor has no right of action upon the promise, that the action at law is in the grantor, and the mortgagee's means of taking direct advantage of the promise is in equity only: *Second Nat. Bank v. Grand Lodge*, 98 U. S. 123; *Bissell v. Bugbee*, 8 Cent. L. J. 272 (U. S. C. C., Ind.); *United States Mortgage Co. v. Hill* (U. S. C. C., Mass., 1879); *Mellen v. Whipple*, 1 Gray, 317; *Exchange Bank v. Rice*, 107 Mass. 37; *Prentiss v. Brinkhall*, 123 Id. 291; *Locke v. Homer*, 131 Id. 93; *Coffin v. Adams*, Id. 133; *Ganssart v.*

Hoge, 73 Ill. 30; *Osborne v. Cabell*, 77 Va. 462. In New Jersey, where the theory prevails that the mortgagee's right rests upon his right of equitable subrogation to the collateral securities obtained by the mortgagor, it is maintained that the mortgagee's right, as it does not rest upon any contract or privity between him and the purchaser, cannot be enforced in an action at law, but the remedy is purely equitable: The principal case; *Crossell v. Currier*, 27 N. J. Eq. 152; *Crossell v. Hospital*, Id. 650.

In some states, however, the mortgagee has his action at law against the grantee. In Connecticut, by statute: Acts 1881, c. 97; see *Meech v. Ensign*, 49 Conn. 191; S. C., 44 Am. Rep. 225. In Rhode Island, on the ground that the transaction amounts to a novation, the grantee being substituted as the debtor, and the mortgagee completing the novation by bringing the action. In this state, the mortgagee may maintain *assumpsit*: *Urquhart v. Brayton*, 12 R. I. 169. In Pennsylvania, also, the mortgagee may have *assumpsit* against the grantee assuming the mortgage: *Merriman v. Moore*, 90 Pa. St. 78; the decisions asserting the principle that one may sue upon a promise on sufficient consideration made to another for his benefit: *Hoff's Appeal*, 24 Pa. St. 200; *Townsend v. Long*, 77 Id. 143; *Justice v. Tallman*, 86 Id. 147. So also *Cooper v. Foss*, 15 Neb. 515; *Carnahan v. Tousey*, 93 Ind. 561; see N. Y. cases *supra*; *Burr v. Beers*, 24 N. Y. 178; *Thompson v. Bertram*, 14 Iowa, 476.

With Consent of Mortgagor, Mortgagee may Maintain Action in Name of Mortgagor upon the promise of a grantee of the mortgagor in a deed poll to assume and pay the mortgage debt: *Coffin v. Adams*, 131 Mass. 133; otherwise, in order to take advantage of the grantee's assumption, he must bring suit for foreclosure: Id.

Grantee Liable to Personal Judgment for Deficiency in Foreclosure.—This is the usual means by which the grantee's liability to the mortgagee is enforced. The mortgage is foreclosed, and in the bill, to which the grantee is made a party, a personal decree for any deficiency is prayed against the grantee, and to this judgment he is liable: See *supra*, "Liability to Mortgagee;" *Cooper v. Foss*, 15 Neb. 515; *Gage v. Jenkinson*, 24 N. W. Rep. 315 (Mich.); *Palmer v. Carey*, 19 Rep. 318 (Wis.); note to *Trotter v. Hughes*, 62 Am. Dec. 141; *Thompson v. Bertram*, 14 Iowa, 476.

Pleading and Practice in Suits by Mortgagee.—The holder of the mortgage need not notify the purchaser who has assumed the mortgage of his acceptance of his promise to discharge the debt. The bringing of the suit is a sufficient acceptance: *Bissell v. Bugbee*, 8 Cent. L. J. 272 (U. S. C. C. Ind.); S. C., 7 Rep. 550; *Carnahan v. Tousey*, 93 Ind. 561; but see *Berkshire Life Ins. Co. v. Hutchings*, 100 Id. 496.

If purchasers who have assumed the payment of the mortgage are not made parties to a suit to foreclose, and a deficiency is found to exist, a suit by bill to compel them to pay the deficiency is maintainable against them: *Pruden v. Williams*, 26 N. J. Eq. 210. The mortgagor is not a necessary party to such suit, as he is merely a surety for the deficiency, and the court may order him to be made a party if necessary to the protection of the purchasers: Id.

In California, the owner of the legal title is a necessary party to the foreclosure of a mortgage executed by his grantor: *Porter v. Muller*, 3 West Coast Rep. 619 (Cal.).

A mortgagor of land, who has consented, without consideration, that the mortgagee might bring an action at law in his name against a person who, by the terms of a deed poll to him from the mortgagor, has promised to pay the mortgage, may withdraw his consent and have the action dismissed, on payment of costs to the mortgagee to the time of such withdrawal: *Coffin v. Adams*, 131 Mass. 133.

To bind the grantee, it must be alleged and proved that he assented to the clause of assumption in the deed; and this may be shown by proof that he signed and sealed the deed, or that the deed was delivered to and accepted by him. By the acceptance of the deed, his assent to all it contains may be inferred; but the words "sold and conveyed" to the grantee are not an avowment of such assent: *Thompson v. Dearborn*, 107 Ill. 87. In a complaint to foreclose a mortgage, an allegation that the grantee of the mortgagor covenanted and agreed to pay the mortgage debt and discharge the mortgage lien is sufficient to sustain a personal judgment against him, although such allegation is made on information and belief: *Pellier v. Gillespie*, 4 West Coast Rep. 500 (Cal.); S. C., 7 Id. 624. A personal judgment cannot be rendered against a subsequent purchaser who has not assumed the payment of a mortgage, although in a foreclosure suit he answers that he is ready and willing to redeem, and to bring the money into court: *Tanguay v. Felthausen*, 45 Wis. 30. If the grantee assumes the mortgage, and executes a bond to the mortgagee conditioned to pay it within a certain time, and the bill of complaint speaks of the bond as a "collateral obligation," the position of the vendee is held to be that of surety of the mortgagor: *Firemen's Ins. Co. v. Wilkinson*, 35 N. J. Eq. 160. In order to enforce the personal liability of a grantee, the complaint need not exhibit the means conveyances executed between such grantee and the mortgagor: *Ellis v. Johnson*, 96 Ind. 377. Nor need the insolvency of the obligor in the bond be charged or proved to warrant, in the foreclosure suit, a decree for payment of the deficiency after sale of the lands: *Stiger v. Mahone*, 24 N. J. Eq. 426. A conveyance of land was made, subject to two mortgages, payment of which was expressed in the deed to be assumed by the grantee. In a suit to foreclose the prior mortgage, the holder of the second mortgage was a party defendant, and the decree directed that the amount of the second mortgage, as well as of the first, should be raised. At the sheriff's sale under execution, the grantee bought the lands in for a trifle more than the sum due on the prior mortgage, leaving a large deficit on the second. Suit was now brought to re-establish and foreclose the second mortgage. The evidence showed that the sale was made in the absence of the second mortgagee, and with the purpose of discharging the lands of the second mortgage without payment of it in full. It was held that in equity the effect of the purchase at the execution sale, and the sheriff's deed, was to pay off the prior mortgage, and to make the second mortgage a first lien for the unpaid amount of it: *Stiger v. Mahone*, 24 N. J. Eq. 426.

GRANTOR'S REMEDY.—The grantor to whom the grantee's promise of assumption is made may sue at law upon the promise, when the mortgage debt has become due and payable. The grantor may take an assignment of the mortgage to himself and foreclose or sue on the agreement and recover the amount paid by him in obtaining the mortgage, not exceeding the amount unpaid on such mortgage: *Mills v. Watson*, 1 Sweeney, 374; *Bolles v. Beach*, 22 N. J. L. 680; S. C., 53 Am. Dec. 263; *Kearney v. Tanner*, 17 Serg. & R. 94; S. C., 17 Am. Dec. 648; *Jones v. Parks*, 78 Ind. 537; *Rubens v. Prindle*, 44 Barb. 336; *Slawson v. Watkins*, 86 N. Y. 597; *Crowell v. Hospital*, 27 N. J. Eq. 650; *Stout v. Folger*, 34 Iowa, 71; *Luney v. Mead*, 60 Id. 469; *Foster v. Atwater*, 42 Conn. 244; *Fenton v. Lord*, 128 Mass. 406; *Furnas v. Durgin*, 119 Id. 500; *Strohauser v. Volz*, 42 Mich. 444. If the grantee fails to pay the mortgage he has agreed to pay as part of the consideration for the deed, and the grantor discharges the mortgage by giving a new security, he is damnified to the whole extent of the failure by the grantee to discharge the mortgage; *Bolles v. Beach*, 22 N. J. L. 680; S. C., 53 Am. Dec. 263. If the mortgagor dis-

charges the mortgage by a payment of money, *assumpsit* for money had and received lies for him against the grantee: *Kearney v. Tanner*, 17 Serg. & R. 94; S. C., 17 Am. Dec. 648; *Wood v. Smith*, 51 Iowa, 156; *Lappen v. Gill*, 129 Mass. 349.

The omission of the deed to state expressly that the amount of the mortgage is part of the consideration makes no difference in the rights of the parties: *Locke v. Homer*, 131 Mass. 93; S. C., 41 Am. Rep. 199. In this action, the written receipts indorsed upon the mortgage by the mortgagees are competent evidence to show payments thereon: *Mill v. Watson*, 1 Sweeny, 374. In case the grantor dies before any cause of action accrues, the land descends to the heirs, and they are the proper parties to sue for a breach of the agreement: *Ayers v. Dixon*, 78 N. Y. 318. If a deed of land subject to a mortgage, which the grantee assumes and agrees to pay, is executed by a husband and wife as grantors, the promise implied by law from the acceptance of the deed is to both, and an action for a breach of the promise should be brought in the name of both: *Fenton v. Lord*, 128 Mass. 466. Under the code practice, the grantor may maintain a bill to have the mortgage satisfied out of the land: *Abell v. Coons*, 7 Cal. 105. One who, in consideration of the price of land, agrees to pay a mortgage covering that and other land is liable to the grantee of the other land in case of a failure to pay, and the liability may be enforced by personal action or by foreclosure suit: *Wright v. Briggs*, 99 Ind. 563. If a purchaser by collusion with the mortgagee buy the land at the foreclosure sale for a sum less than its value, and less than the mortgage debt, the vendor may have the sale set aside; and such collusion would be a defense in a suit against him for the deficiency: *Cleveland v. Southard*, 25 Wis. 479. A mortgagor who has sold subject to the mortgage debt, when he is compelled to pay it, is subrogated to the benefit of the security without any formal assignment of it to him, and he thereby becomes an equitable assignee of it, and may enforce it against the property: *Kinnear v. Lowell*, 34 Me. 299; *Baker v. Terrell*, 8 Minn. 195; *Ayers v. Dixon*, 78 N. Y. 318; *Risk v. Hoffman*, 69 Ind. 137.

Grantor may Sue before He has Paid Mortgage Debt. The contract of assumption is an agreement, not merely of indemnity, but to pay the debt; and it is not necessary, therefore, as in the case of indemnifications, that the grantor show that he has been to some extent damaged by the grantee's breach of agreement; but the grantor, although he has not paid the debt, or any part thereof, may recover the unpaid amount of the debt when it becomes due and payable: *Locke v. Homer*, 131 Mass. 93; *Furnas v. Durgin*, 119 Id. 500; *Brewer v. Worthington*, 10 Allen, 229; *Little v. Little*, 13 Pick. 426; *Sparkman v. Gove*, 44 N. J. L. 252; *Bowen v. Kurtz*, 37 Iowa, 239; *Rubens v. Prindle*, 44 Barb. 336; *Gregory v. Hartley*, 6 Neb. 356; see *Valentine v. Wheeler*, 122 Mass. 566, 568; *Fiske v. Tolman*, 124 Id. 254, 256; *Gaffney v. Hicks*, Id. 301, 304; *Wilson v. Stillwell*, 9 Ohio St. 467; *Stout v. Folger*, 34 Iowa, 71; *Foster v. Atwater*, 42 Conn. 244; *Snyder v. Summers*, 1 Lea, 534, 540. *Contra*: see *McConaghy's Estate*, 13 Phila. 399; *Burbank v. Gould*, 15 Me. 118. Such promise, when no time is specified for the payment of the mortgage, is a promise to pay it when it becomes due; or if it be already due, then to pay it forthwith: *Furnas v. Durgin*, 119 Mass. 500. And the agreement is broken by a failure to pay the mortgage within a reasonable time after its maturity: *Braman v. Douse*, 12 Cnah. 227. "If the grantee does not pay *ad diem*, and so breaks his agreement, the fact that he may be also in danger of having the mortgage enforced against his land affords no defense to the action at law by the grantor against him upon his agreement. If he has any equities, by reason of his failure

to pay having been caused by accident, mistake, or fraud, or any other matter against which a court of chancery will grant relief, his remedy must be sought in equity, as, for instance, by bill against the mortgagee and the grantor, on which the mortgagee may be ordered to accept payment of the mortgage debt, with proper interest, expenses, and costs; and the grantor, upon such payment being made by the grantee, may be restrained from prosecuting his action at law against the latter, except for nominal damages." *Per* Gray, C. J., in *Locke v. Homer*, 131 Mass. 108. But when the suit by the grantor to enforce his grantee's agreement to assume and pay a mortgage is in equity, and not at law, payment of the amount of the mortgage debt will not be enforced against the purchaser until the grantor has paid the mortgage; or if a decree is made without such payment, it will be that so much as is necessary to pay the mortgage be retained and paid directly to the mortgagee: *Waters v. Bossel*, 58 Miss. 602; see also *Ayers v. Dixon*, 78 N. Y. 318. A mortgage conditioned to pay the mortgagor's earlier mortgage upon lands conveyed by him to the mortgagee and save him harmless therefrom, cannot be foreclosed until the mortgagee has paid the earlier mortgage, at least if the mortgagee in the earlier mortgage is not made a party to the suit: *Learned v. Bishop*, 42 Wis. 470.

Measure of Damages in an action by the grantor upon the grantee's contract of assumption is the amount of the debt unpaid and interest: *Locke v. Homer*, 131 Mass. 93; S. C., 41 Am. Rep. 199; *Mulig v. Fiske*, Id. 110; *Reed v. Paul*, Id. 129; *Sparkman v. Gove*, 44 N. J. L. 252; and the fact that the defendant has sold the estate to a third person does not affect the plaintiff's rights: *Reed v. Paul*, 131 Mass. 129. If the grantor has paid the mortgage debt before suit brought, the measure of damages is the amount so paid: *Town v. Wood*, 37 Ill. 512; see *supra*, "Grantor's Remedy." If payment by the grantee to the mortgagee were made at maturity, there would be no breach of his promise to the grantor. If it were made afterwards, the latter, in an action upon that promise, could recover only nominal damages: *Locke v. Homer*, 131 Mass. 108, S. C., 41 Am. Rep. 199. The defendant may, if he will, perform his agreement and pay the debt at any time before final judgment, and the damages then to be recovered will be nominal only: *Furnas v. Dargin*, 119 Mass. 508; *Elmer v. Welch*, 47 Conn. 56, 59; *Hall v. Way*, 4 Id. 467.

CONTRACT OF ASSUMPTION, FORM OF.—*Promise to Pay must be Clear.* No particular formal word need be used to establish a promise on the part of the mortgagor's grantee to pay off the mortgage: *Belmont v. Coman*, 22 N. Y. 438; but the intention to impose this obligation upon the grantee must clearly appear: *Stebbins v. Hall*, 29 Barb. 524; *Gage v. Jenkinson*, 24 N. W. Rep. 815 (Mich.); *Fairchild v. Lynch*, 42 N. Y. Super. Ct. 265. Where, from the terms of the deed, it is doubtful whether or not the grantee is personally bound, evidence of the value of the premises, or of the agreed consideration for them, and also as to whether the grantee retained part of the consideration to pay the debt, is admissible to aid in the construction of the deed: *Winans v. Wilkie*, 41 Mich. 264. In a subsequent case in this state, however, it was held, relying partly upon a statute, that the contract of assumption cannot be established by inference: *Gage v. Jenkinson*, 24 N. W. Rep. 815.

What Words Evidence Promise.—The contract of assumption is usually established by the insertion of a recital in the deed, stating that the grantee assumes and agrees to pay the mortgage as a part of the consideration for the conveyance: See *Stebbins v. Hall*, 29 Barb. 524; *Collins v. Rowe*, 1 Abb. N. C. 87; *Cranford v. Edwards*, 33 Mich. 354; *Dunn v. Rogers*, 43 Ill. 280; *Lennig's*

Estate, 52 Pa. St. 138; *Huyler v. Atwood*, 26 N. J. Eq. 504; *Schmucker v. Sibert*, 18 Kan. 104; *Fairchild v. Lynch*, 10 Jones & S. 265; *Burr v. Beers*, 24 N. Y. 178; *Weed Sewing Machine Co. v. Emerson*, 115 Mass. 554. A stipulation that the grantee takes "subject to the payment" of the outstanding mortgage, or any equivalent expression which clearly imports an obligation intentionally created by the grantor and assumed by the grantee, will establish a personal obligation on the part of the grantee for its payment: *Stebbins v. Hall*, 29 Barb. 524; *Carley v. Fox*, 38 Mich. 387; *Hoy v. Bramhall*, 19 N. J. Eq. 563; *Collins v. Bowen*, 1 Abb. N. C. 97; *Locke v. Homer*, 131 Mass. 93; S. C., 41 Am. Rep. 199; *Mulig v. Fiske*, 131 Mass. 110; see *Furnas v. Durgin*, 119 Id. 500; *Sparkman v. Gove*, 44 N. J. L. 252; *Bowen v. Beck*, 94 N. Y. 86. The supreme court of Pennsylvania regards these words as implying merely a contract of indemnity between the vendor and vendee, in the absence of special circumstances from which a personal liability to pay the mortgage debt to the mortgagee can be inferred: *Moore's Appeal*, 88 Pa. St. 45; *Samuel v. Peyton*, Id. 465; *Davis's Appeal*, 89 Id. 272; *Merriman v. Moore*, 90 Id. 78; *Taylor v. Mayer*, 93 Id. 42. And the present statutory law of this state is that the words "subject to the payment" of a mortgage shall not make the grantee personally liable to the mortgagee: *Purdon's Ann. Dig.* 1877, p. 2160, secs. 5, 6. In Massachusetts, however, it is held that the acceptance of a deed containing a covenant that the land conveyed is free from incumbrances, except a mortgage previously made by the grantor, "which the grantee assumes and agrees to hold the grantor harmless from," constitutes a contract by the grantee, not merely to indemnify the grantor, but to pay the mortgage debt: *Locke v. Homer*, 131 Mass. 93; S. C., 41 Am. Rep. 199; *Mulig v. Fiske*, Id. 110; see *Furnas v. Durgin*, 119 Mass. 500; *Sparkman v. Gove*, 44 N. J. L. 252; *Bowen v. Beck*, 94 N. Y. 86. It is immaterial that the grantee does not specially stipulate "to pay" the debt, if he undertakes "to assume" it, for this is the same in legal effect: *Locke v. Homer*, 131 Mass. 109, citing *Braman v. Dowe*, 12 Cush. 227; *Drury v. Tremont Improvement Co.*, 13 Allen, 168, 171; *Stout v. Folger*, 34 Iowa, 71. Of course the purchaser incurs no personal liability, if at the time of the purchase it is agreed that he shall not be liable: *Insurance Co. v. Addicks*, 12 Phila. 490; and see *Moore's Estate*, Id. 104.

"*Subject to Mortgage.*" *Effect of, in Deed.*—A statement in a deed that it is made subject to a specified mortgage, does not alone make the grantee personally liable for the payment of the mortgage debt. Such a stipulation does not sufficiently clearly import an intention by the grantor to create, and by the grantee to assume, a personal obligation to pay the mortgage debt: *Patton v. Adkins*, 42 Ark. 197; *Hall v. Morgan*, 79 Mo. 47; *Lawrence v. Towle*, 59 N. H. 28; *Lewis v. Day*, 53 Iowa, 579; *Rapp v. Stoner*, 104 Ill. 618 (warranty deed); *Fiske v. Tolman*, 124 Mass. 254; *Hubbard v. Ensign*, 46 Conn. 576; *Binsse v. Paige*, 1 Abb. Fr. Dec. 142; S. C., 1 Keyes, 89; *Stebbins v. Hall*, 29 Barb. 524; see *Weed Sewing Machine Co. v. Emerson*, 115 Mass. 554; *Strong v. Converse*, 8 Allen, 557; *Drury v. Tremont etc. Co.*, 13 Id. 168, 171; *Beemgardner v. Allen*, 6 Munf. 439; *Foster v. Atwater*, 42 Conn. 244; *Walker v. Goldsmith*, 7 Or. 161; *Fowler v. Fay*, 62 Ill. 375; *Comstock v. Hitt*, 37 Id. 542, 546; *Dunn v. Rogers*, 43 Id. 260; *Campbell v. Patterson*, 58 Ind. 66; *Woodbury v. Swan*, 58 N. H. 380; *Trotter v. Hughes*, 12 N. Y. 74; *Belmont v. Coman*, 22 Id. 438; *Collins v. Rowe*, 1 Abb. N. C. 97; *Tillotson v. Boyd*, 4 Sandf. 516; *Murray v. Smith*, 1 Duer, 412; *Johnson v. Monell*, 13 Iowa, 300; *Hull v. Alexander*, 26 Id. 569; *Winans v. Wilke*, 41 Mich. 264; *Tanguay v. Fellhausen*, 43 Wis. 30. In Michigan, however, it has been held in a late case that where a deed is expressly made subject to a mortgage, though it does not in terms

bind the grantee to pay it, yet he is to be treated, as between himself and the mortgagor, as having assumed the mortgage, and is personally liable for whatever deficiency there may be after foreclosure sale: *Craigfield v. Shear*, 49 Mich. 313.

Where the grantee accepts a deed "subject to" a specified mortgage, the land is primarily liable as between the grantor and grantee, and the grantor is liable for any deficiency after a foreclosure sale fairly made: *Johnson v. Zink*, 51 N. Y. 333; *Comstock v. Hitt*, 37 Ill. 542; *Gayle v. Wilson*, 30 Gratt. 166. The difference between assuming the mortgage debt and taking the land subject to the mortgage is that, in the former case, the grantee becomes personally liable for the payment of the debt, and may be subjected to a personal judgment for a deficiency should the land be insufficient to satisfy the mortgage debt; and in the latter case he does not assume such liability, but in both cases the premises are equally liable to sale on foreclosure: *Woodbury v. Swan*, 58 N. H. 380; *Miller v. Thompson*, 34 Mich. 10; *Wisons v. Wilkie*, 41 Id. 264; *Strohauer v. Volk*, 42 Id. 444; *Vreeland v. Van Blarcom*, 35 N. J. Eq. 530. A conveyance subject to a mortgage makes the premises in the hands of the grantee and his privies as effectually charged with the incumbrance of the mortgage debt as if it had been expressly mortgaged therefor: *Sweetser v. Jones*, 35 Vt. 317; *Berry v. Whitney*, 40 Mich. 65; *Mansuring v. Powell*, Id. 371; *Cobb v. Dyer*, 69 Me. 494; *Fuller v. Hunt*, 48 Iowa, 163. And in both of the above-named cases, the grantee is estopped to deny the validity of the mortgage: *Johnson v. Thompson*, 129 Mass. 398; *Howard v. Chase*, 104 Id. 249; *Conover v. Hobart*, 24 N. J. Eq. 120; *Lee v. Stiger*, 30 Id. 610; *Pinnell v. Boyd*, 33 Id. 190; *Dolman v. Cook*, 14 Id. 56, 63; *Green v. Turner*, 28 Iowa, 112; *Greither v. Alexander*, 15 Id. 470; *Perry v. Kearns*, 13 Id. 174; *Fuller v. Hunt*, 48 Id. 163; *Forgy v. Merryman*, 14 Neb. 513; *Styles v. Price*, 64 How. Pr. 227.

When Mortgage Debt Forms Part of Consideration of Purchase, the purchaser is bound to the extent of the property to indemnify the grantor against the latter's personal liability to pay the mortgage, although the purchaser has not entered into any obligation or agreement to pay it. From the nature of the transaction, a promise on the part of the purchaser to that effect will be implied: *Townsend v. Ward*, 27 Conn. 610; *Wood v. Smith*, 51 Iowa, 156; *Scott v. Featherston*, 5 La. Ann. 306; *Schlaire v. Greaud*, 19 Id. 125; *Stevenson v. Black*, 1 N. J. Eq. 338; *Hartshorne v. Hartshorne*, 2 Id. 349; *Crowell v. Hospital*, 27 Id. 650; *Dorr v. Peters*, 3 Edw. 132; *Marsh v. Pike*, 1 Sandf. Ch. 210; *Blyer v. Monholland*, 2 Id. 478; *Ferris v. Crawford*, 2 Denio, 595; *Flagg v. Thurber*, 14 Barb. 196; *Cornell v. Prescott*, 2 Id. 16; *Moore's Appeal*, 88 Pa. St. 450; *Burke v. Gummy*, 49 Id. 518; *Thompson v. Thompson*, 4 Ohio St. 333; *Waring v. Ward*, 7 Ves. 332. The purchaser is, however, under no liability, beyond the value of the land. If the mortgagor pay the mortgage debt, the purchaser will be compelled in equity to refund the money so paid, or to return the land. He may release the lands to the mortgagor, and thus discharge his obligation to indemnify the mortgagor: *Tickner v. Dodd*, 4 N. J. Eq. 454; *Crowell v. Hospital*, 27 Id. 650, 655; *Mount v. Van Ness*, 33 Id. 262, 265. The mere deduction of the amount of the mortgage from the purchase-price does not impose a personal liability: *Bennett v. Bates*, 94 N. Y. 354.

Agreement to Pay Amount of Mortgage as Part of Purchase-money is, in effect, an assumption of the payment of the mortgage debt, and not merely a taking "subject to" the mortgage, and the grantee will, therefore, be personally liable for the payment of the debt. The effect of the trans-

action is to leave a part of the purchase-money in the hands of the purchaser, for the purpose of paying the incumbrance which imposes upon him a personal liability: *Thayer v. Torrey*, 37 N. J. L. 339; *Heid v. Vreeland*, 30 N. J. Eq. 591; *Tichenor v. Dodd*, 3 Green Ch. 454; *Kennedy v. Brown*, 61 Ala. 296; *Urquhart v. Brayton*, 12 R. L. 169; *Jewett v. Draper*, 6 Allen, 434; *Comstock v. Hitt*, 37 Ill. 542; *Twitchell v. Mears*, 8 Biss. 211; *Palmeter v. Carey*, 19 Rep. 318 (Wis.); *Daub v. Englebach*, 109 Ill. 267; *Cooper v. Foss*, 15 Neb. 515. There is an implied promise on the part of the purchaser to pay the mortgage at maturity, or, if already due, to pay it immediately or within a reasonable time: *Braman v. Dooce*, 12 Cush. 227; *Smith v. Truslow*, 84 N. Y. 660. And the burden of proof is upon the purchaser to show that he has performed his obligation: *Jewett v. Draper*, 6 Allen, 434. The mere deduction of the amount of a mortgage from the purchase price does not, in the absence of an agreement to pay, absolutely impose upon the grantee the duty of paying, or suffering his land to be taken in payment of the mortgage. While it is evidence of the grantor's intention to subject the land to such payment, it is not controlling or conclusive; it may be inferred that the deduction was made to protect the grantee against a questionable incumbrance: *Bennett v. Bates*, 94 N. Y. 354. Where the grantee took the land subject to a one-thousand-dollar mortgage, and as part of the consideration agreed to pay five hundred dollars of the mortgage debt when due, or whenever the grantor should be ready to pay the residue, the grantee was bound to pay only five hundred dollars, without interest, and not one half the mortgage debt: *Edwards v. Thostenson*, 64 Iowa, 680.

Oral or Parol Agreement is Valid. An oral promise by the purchaser to assume and pay the mortgage is sufficient, and may be enforced in equity by the grantor or the holder of the mortgage: *Ely v. McNight*, 30 How. Pr. 97; *Wilson v. King*, 23 N. J. Eq. 150; *Ream v. Jack*, 44 Iowa, 325; *Bolles v. Beach*, 22 N. J. L. 680; S. C., 53 Am. Dec. 263; *Putney v. Farnham*, 27 Wis. 187; *Lamb v. Tucker*, 42 Iowa, 118; *Iowa Loan & Trust Co. v. Mowery*, 24 N. W. Rep. 747 (Iowa); *Merriman v. Moore*, 90 Pa. St. 78. The agreement of assumption is independent of the deed, and the oral agreement is additional and not contradictory of the deed, or at variance with it, nor is it merged in the terms of the deed: *Taintor v. Hemmingway*, 18 Hun, 458; *Murray v. Smith*, 1 Duer, 413; *Barker v. Bradley*, 42 N. Y. 316; *Remington v. Palmer*, 62 N. Y. 31. An assumption to pay the mortgage debt is valid, though not sealed: *Huyler's Ex'rs v. Atwood*, 26 N. J. Eq. 504; see *Colgin v. Healey*, 3 Leigh, 85. The agreement may be wholly outside of the conveyance: *Schnucker v. Sibert*, 18 Kan. 104; see *Drury v. Tremont etc. Co.*, 13 Allen, 168. A covenant in the deed that the premises are free from incumbrances, or a recital that the consideration has been paid in full, does not estop either the grantor or the holder of the mortgage from proving the agreement and recovering upon it: *Wilson v. King*, 23 N. J. Eq. 150; *Bowen v. Kurtz*, 37 Iowa, 239. See also *Conover v. Brown*, 29 N. J. Eq. 510, as to evidence to establish an oral assumption.

Scope and Construction of Assumption.—An agreement to discharge a mortgage on land conveyed covers incidents to the mortgage debt, and renders the grantee personally liable; for instance, upon a covenant in the mortgage for the payment of an attorney's fee in case of a foreclosure: *Johnson v. Harder*, 45 Iowa, 677. But an agreement to assume the payment of the interest upon a mortgage cannot be construed so as to impose a liability to assume the payment of the principal: *Manhattan Life Ins. Co. v. Cranford*, 9 Abb. N. C. 365. Though the covenant of assumption in the deed be absolute and certain, its

effect may be modified by a contemporaneous agreement of the parties, as, for instance, an agreement that the grantor may, within a certain time, demand a reconveyance of the property, subject to the same incumbrance: *Gaffney v. Hicks*, 124 Mass. 301.

ACCEPTANCE OF DEED BINDS GRANTEE. By the acceptance of a deed containing a stipulation that the grantee assumes and agrees to pay the mortgage, or words to that effect, the grantee becomes personally liable to pay the mortgage: *Taylor v. Whitmore*, 35 Mich. 97; *Bowen v. Beck*, 94 N. Y. 86; S. C., 46 Am. Rep. 124; *Spaulding v. Hallenbeck*, 35 N. Y. 204, affirming 39 Barb. 79; 30 Id. 292; *Wales v. Sherwood*, 1 Abb. N. C. 101; *Trotter v. Hughes*, 12 N. Y. 74; *Bishop v. Douglass*, 25 Wis. 696; *Unger v. Smith*, 44 Mich. 22; *Klein v. Isaacs*, 8 Mo. App. 568; *Dickason v. Williams*, 129 Mass. 182; *Urquhart v. Braxton*, 12 R. I. 169. It is not necessary that he should sign the deed or any instrument: *Atlantic Dock Co. v. Leavitt*, 54 N. Y. 35; *Ricard v. Sanders*, 44 Id. 179; *Locks v. Homer*, 131 Mass. 93, 102. If the conveyance contains words imposing the obligation of assumption, though it be a deed poll, the grantee will bind himself by the acceptance of the deed as effectually as if he had joined in the execution of the deed as an indenture: *Bowen v. Beck*, 94 N. Y. 86; *Atlantic Dock Co. v. Leavitt*, 54 N. Y. 35; S. C., 13 Am. Rep. 556; *Belmont v. Coman*, 22 N. Y. 438; *Spaulding v. Hallenbeck*, 35 Id. 204; *Collins v. Rowe*, 1 Abb. N. C. 97; *Trotter v. Hughes*, 12 N. Y. 74, 78; *Fairchild v. Lynch*, 46 N. Y. Super. Ct. 1; *Crawford v. Edwards*, 33 Mich. 354; *Hugler v. Atwood*, 26 N. J. Eq. 504; *Finley v. Simpson*, 22 N. J. L. 311; *Schnucker v. Sibert*, 18 Kan. 104; *Pike v. Brown*, 7 Cush. 133; *Braman v. Douse*, 12 Id. 227; *Locks v. Homer*, 131 Mass. 93; *Furnas v. Dwyer*, 119 Id. 500; *Gaffney v. Hicks*, 131 Id. 124. From the acceptance of the deed, the assent of the grantee to all it contains may be inferred: *Thompson v. Dearborn*, 107 Ill. 87. Proof of the record of the deed raises a presumption that the title vested in the grantee, and that he is bound by the covenant to assume the mortgage, unless there is some evidence tending to show the contrary: *Lawrence v. Farley*, 9 Abb. N. C. 371; *contra: Thompson v. Dearborn*, 107 Ill. 87. The acceptance of the conveyance imposing this liability by a duly constituted agent of the grantee, will bind the latter: *Fairchild v. Lynch*, 10 Jones & S. 265. But the grantee will not be bound where there is no delivery of the deed to him: *Culver v. Badger*, 29 N. J. Eq. 74. And when a deed is made to a person without his knowledge or consent, and he repudiates it as soon as he becomes aware of its existence, he incurs no liability: *Cordts v. Hargrave*, Id. 446; *Stevens Institute v. Sheridan*, 30 Id. 23. Where by the terms of the contract of purchase of land, the vendee is to take it subject to a certain mortgage, he may properly refuse to accept a deed containing a clause reciting that he assumes the payment of such mortgage: *Lewis v. Day*, 53 Iowa, 575; *Manhattan Life Ins. Co. v. Crawford*, 9 Abb. N. C. 365.

DEFENSES AGAINST LIABILITY OF GRANTEE.—The grantee is not bound to a personal liability on the mortgage debt, unless he has entered into such an agreement as will bind him to assume and pay it: See "Contract of Assumption, Form of," *supra*. His grantor must generally be personally liable on the debt, or he will not be bound: See Id. So a rescission of the contract between the grantor and grantee may constitute a defense: Id. A reconveyance may extinguish the purchaser's liability: *Crowell v. Hospital*, 27 N. J. Eq. 650. It is a good defense that the grantor had no title to the property, and that his representations respecting it were false and fraudulent, and that the defendant was thereby induced to assume the payment of the mortgage: *Benedict v. Hunt*, 32 Iowa, 27; *Fuller v. Lamar*, 53 Id. 477; see *State v.*

Citizens' Bank, 33 La. Ann. 705. It is also a good defense against the grantee's liability that the covenant of assumption is invalid between the parties, as where there was no agreement for assumption between the grantor and grantee, and the agreement was inserted in an unusual place and escaped the notice of the grantee: *Bull v. Tinsworth*, 29 N. J. Eq. 73; *Parker v. Jenks*, 36 Id. 396; or where the agreement is that the grantee shall take subject to the mortgage, not that he shall assume its payment, and he accepts without inspection a deed in which he is made to assume the mortgage, and he does not discover this until judgment for deficiency has been entered against him in a foreclosure suit, he may have the judgment opened and may show by the contract that he was not liable for the deficiency: *Northern Dispensary v. Merriam*, 59 How. Pr. 226; *Deyermund v. Chamberlin*, 22 Hun. 110; *Waring v. Somborn*, 82 N. Y. 604; and he may have the mortgage reformed by striking out the covenant of assumption, unless an estoppel has arisen in favor of a third person: *Real Estate Trust Co. v. Balch*, 45 N. Y. Super. Ct. 523; *Kilmer v. Smith*, 77 N. Y. 226; S. C., 43 Super. Ct. 461; *O'Neill v. Clark*, 33 N. J. Eq. 444; for an innocent purchaser for value before due of mortgage notes has a right to rely upon recitals in a deed from the mortgagor to his grantee, wherein the latter "assumes and agrees to pay" the mortgage incumbrance, although such recital was in fact inserted by mistake and without the knowledge of the parties: *Hayden v. Snow*, 9 Bism. 511; and see *New Orleans etc. Banking Co. v. Montgomery*, 75 U. S. 16; *Carpenter v. Lougan*, 16 Wall. 271.

The mortgagee's right is a mere right of substitution, subject to equities existing between the mortgagor and the purchaser: *Osborne v. Cabell*, 77 Va. 462. In the absence of fraud, however, a grantee who has assumed a mortgage cannot show by parol that he never agreed to assume it, and that he never authorized or knew of the insertion of such an agreement in the deed: *Mulig v. Fiske*, 131 Mass. 110; *Coolidge v. Smith*, 129 Id. 554; *Blizer v. Monholland*, 2 Sandf. Ch. 478. And where the grantee, by payments of interest upon the mortgage or by other acts, has recognized the validity of the assumption clause, he will not be heard afterwards to urge in defense that the clause was fraudulently inserted: *Miller v. Thompson*, 34 Mich. 10; *Smith v. Graham*, Id. 302. If, on the other hand, the contract of sale provides for the assumption of the mortgage by the purchaser, and the deed omits to recite such covenant, it seems that this contract may be enforced, if there is a deficiency: *Slawson v. Watkins*, 44 N. Y. Super. Ct. 73. The purchaser cannot avoid his liability on the ground that, on account of a mistake in the description, he acquired no legal title to the land intended to be conveyed, if he obtained possession of it under the deed, and the right by virtue thereof to have the mistake corrected: *Crawford v. Edwards*, 33 Mich. 354; *Comstock v. Smith*, 26 Id. 306; see *Klein v. Isaacs*, 8 Mo. App. 568. An imperfect description in the mortgage is no defense: *Figart v. Halderman*, 75 Ind. 564; see *Mulig v. Fiske*, 131 Mass. 110. If, however, a grantee under a warranty deed, who has assumed a mortgage, is evicted by paramount title, the holder of the mortgage cannot enforce the covenant: *Dunning v. Leavitt*, 85 N. Y. 30; S. C., 39 Am. Rep. 617, reversing, 20 Hun. 178; compare *Tallmadge v. Wallis*, 25 Wend. 117; *Vrooman v. Turner*, 69 N. Y. 290; S. C., 25 Am. Rep. 195; *Flagg v. Munger*, 9 N. Y. 483.

Grantee Estopped to Contest Validity of Mortgage, etc.—A grantee who has not assumed the mortgage, and has purchased without any deduction from the price on account of the incumbrance, may oppose the same defenses to the mortgage that the mortgagor might: *Bennett v. Kuhn*, 57 Wis. 582; *Maker v. Lanfrom*, 86 Ill. 513. If the mortgage is void, and not voidable, he may con-

test its validity: *Hamilton v. Colt*, 14 R. I. 209. But the purchaser who has assumed the mortgage cannot set up that it was made without consideration, or that the consideration has failed, and therefore that it is not valid against his grantor. For the grantor, having devoted a part of the purchase price to the payment of the mortgage, it does not matter whether or not he was legally obliged to pay, or whether the mortgage was, at the time of the sale, a lien upon the land. It does not lie in the mouth of the grantee to speak of a defense which does not concern him. His obligation is legal and binding, and made upon an unimpeachable consideration. If the mortgagor has chosen to recognize the incumbrance as valid, this is binding upon the grantee, since his rights are not infringed: See *Crawford v. Edwards*, 33 Mich. 354; *Miller v. Thompson*, 34 Id. 10; *Haile v. Nichols*, 16 Hun, 37; *Parkinson v. Sherman*, 74 N. Y. 88. One who has by a valid agreement assumed to pay a mortgage on premises conveyed to him cannot contest its validity on the ground that the grantor had not a mortgageable interest: *Bond v. Dolby*, 20 Rep. 150 (Neb.); or defend on the ground that the amount assumed by him is not due on the mortgage: *Ritter v. Phillips*, 53 N. Y. 586; *Johnson v. Parmely*, 14 Hun, 398; *Scurry v. Eldridge*, 63 Ind. 44; *Kennedy v. Brown*, 61 Ala. 296; *Green v. Houston*, 22 Kan. 35. But see *Mansur v. Bartholomew*, 8 Cent. L. J. 72 (Ind.); or that the mortgagee has taken collateral security for the same debt: *Ferris v. Crawford*, 2 Denio, 595; or that the debt is different or payable in a manner different from its terms: *Klein v. Isaacs*, 8 Mo. App. 568; or that the mortgage was defectively executed: *Pidgeon v. Trustees*, 44 Ill. 501; *Greither v. Alexander*, 15 Iowa, 470; *contra: Goodman v. Randall*, 44 Conn. 321, a decision contrary to reason and authority. Though the mortgagee has not paid the full consideration of the mortgage, the assuming grantee cannot redeem, except by paying the full amount: *Oar v. Hoak*, 115 Mass. 120 (mortgage to secure future advances).

A purchaser at execution sale of land incumbered by a mortgage, which the judgment debtor had in his deed of purchase assumed to pay, succeeds merely to the debtor's rights in the property, and is estopped as the debtor was to deny the validity of the mortgage: *Kennedy v. Brown*, 61 Ala. 296; see also *Conkling v. Secor &c. Co.*, 55 How. Pr. 269; *Stebbins v. Miller*, 12 Allen, 591; *Russell v. Dudley*, 3 Met. 147-151.

Usury.—Where a grantee assumes the payment of a mortgage upon the premises conveyed, or takes expressly subject to such mortgage, the amount of which is deducted from the purchase price, he cannot claim an abatement of the amount of the debt on the ground that it is usurious, or otherwise set up usury as a defense: *Mahony v. MacKubin*, 54 Md. 268; *Easley v. Sloan*, 16 Ill. App. 63; S. C., Id. 572; *Flanders v. Doyle*, Id. 508; *Wilkinson v. Doyle*, Id. 514; *Frost v. Shaw*, 10 Iowa, 491; *De Wolf v. Johnson*, 10 Wheat. 367; *Cramer v. Lepper*, 26 Ohio St. 59; *Busby v. Finn*, 1 Id. 409; *Bearce v. Barstow*, 9 Mass. 45; *Hartley v. Harrison*, 24 N. Y. 170; *Sands v. Church*, 6 Id. 347; *Cope v. Wheeler*, 41 Id. 303; *Ritter v. Phillips*, 53 Id. 586; *Shufelt v. Shufelt*, 9 Paige, 137; *Root v. Wright*, 21 Hun, 344; *Barthel v. Elias*, 2 Abb. N. C. 364. But one who buys land with the express intention on the part of himself and his grantor to avoid a prior mortgage on the ground of usury may set up this defense: *Neuman v. Kershaw*, 10 Wis. 333; *Ludington v. Harris*, 21 Id. 239. And where there is no assumption of the mortgage debt, or any agreement that it be paid out of the land, usury is an admissible defense: *Maher v. Lanfrom*, 86 Ill. 513; *Smith v. Cross*, 16 Hun, 487; *Stevens Institute v. Sheridan*, 30 N. J. Eq. 23; *Pearson v. Kingsland*, 3 Edw. 195.

OBLIGATIONS OF SUCCESSIVE PURCHASERS.—If each of several successive purchasers covenants to assume and pay the mortgage, each becomes an original promisor, and the original mortgagor is virtually their surety, and he may pay the mortgage debt at maturity and acquire the title, without canceling the debt as to them, or releasing the lien: *Flagg v. Geltmacher*, 98 Ill. 293; *Weber v. Zeimet*, 30 Wis. 283; *Towey v. Bank of Orleans*, 8 Paige, 649. The mortgagee may hold either or all of the grantees for the debt, and is not obliged to look to the last one: *Mechanics' Bank v. Goff*, 13 R. I. 516; *Pruden v. Williams*, 26 N. J. Eq. 210; see *Weber v. Zeimet*, 30 Wis. 283; *Freeman v. Auld*, 44 N. Y. 50; S. C., 37 Barb. 587; *Calko v. Davies*, 8 Hun, 222; *Vreeland v. Van Blarcom*, 35 N. J. Eq. 530. If a grantee who has assumed a mortgage convey subject to the mortgage, but without obtaining from his grantee a covenant of assumption, he continues personally liable: *Fleishhauer v. Doelner*, 9 Abb. N. C. 372. Where a grantee receives the title merely for the purpose of conveying it to another, he is not liable upon a clause assuming a mortgage on the land: *Deyermant v. Chamberlin*, 22 Hun, 110. Where there are successive grantees of the mortgaged premises, each assuming payment of the mortgage debt, the decree for deficiency should determine and adjudge the order of the liability of the several grantees, especially where matter occurring between the parties may require a marshaling of securities: *Youngs v. Trustees*, 31 N. J. Eq. 290. A stipulation in a purchase-money mortgage that on a sale by the purchaser of any portion of the premises, the mortgagee should release that portion on receiving a proportionate part of the amount then due, was held personal to the mortgagor, and not available by the grantees of a person to whom he sold the entire tract: *Squier v. Shepard*, 38 N. J. Eq. 331. A release by the mortgagor of an intermediate grantee from his covenant of assumption does not release a subsequent grantee: *Ellis v. Johnson*, 96 Ind. 377.

GRANTEE OF PORTION OF MORTGAGED PREMISES: See *Gaskill v. Sine*, *post*, p. 105, and note; *Knowles v. Lawton*, 63 Am. Dec. 290, and note 298. Contribution among purchasers of mortgaged premises: See *Morrison v. Beckwith*, 16 Id. 136, note 141-143. When the mortgagor sells a part only of the mortgaged premises, but the purchaser assumes the payment of the whole mortgage upon the entire premises as a part of the consideration, the portion purchased is the primary fund for the payment of the mortgage: *Bowme v. Lynde*, 91 N. Y. 92; *Russell v. Pistor*, 7 Id. 171; S. C., 57 Am. Dec. 509, and note 512; *Iowa Loan and Trust Co. v. Mowery*, 24 N. W. Rep. 747 (Iowa); *Welch v. Beers*, 8 Allen, 151; see *Salem v. Edgerly*, 33 N. H. 46. One who, upon purchase of a portion of a tract, assumed a mortgage upon the whole tract, cannot, by paying the mortgage and taking an assignment to himself, keep it alive against the portion not purchased: *Johnson v. Walter*, 60 Iowa, 315. Where a mortgagor successively conveys two portions of the mortgaged premises to different persons, with a stipulation in the first deed that the grantee will pay the mortgage, the second grantee will have an equitable right to have the mortgage first enforced against the portion first conveyed, of which right the mortgagor cannot afterwards deprive him: *Russell v. Pistor*, 7 N. Y. 171; S. C., 57 Am. Dec. 509; *Baring v. Moore*, 4 Paige, 166. If the deed is recorded, it is notice to any subsequent purchaser, whether he takes by grant or by foreclosure sale: *Russell v. Pistor*, 7 N. Y. 171; S. C., 57 Am. Dec. 509, and note 512.

A purchaser of a portion of the mortgaged premises, who assumes the payment of a proportionate part of the mortgage debt, is bound to pay such part in exoneration of the residue: *Torrey v. Bank of Orleans*, 9 Paige, 649; S. C.,

7 Hill, 260; *Hilton v. Bissell*, 1 Sandf. Ch. 407; *Ayers v. Dixon*, 78 N. Y. 318; *Harlem Savings Bank v. Mickelsburgh*, 57 How. Pr. 106. Where a mortgagor sells a portion of the mortgaged premises, and in the deed of conveyance expresses that the same is "subject to the payment by the said grantees of all existing liens upon said premises," the effect of this charge is to make the part so conveyed the principal debtor for a proportionate part of the mortgage debt, and the mortgagor a surety only: *Hoy v. Bramhall*, 19 N. J. Eq. 563. If by the terms of the sale of a part of the mortgaged premises by the mortgagor the mortgage is to remain a common charge upon the whole, and to be paid by the mortgagor and the purchaser, without any specific agreement as to the proportion which each one is to pay, they must contribute according to the relative value of each one's part: *Id.* A purchaser of the undivided half of mortgaged property, who assumes to pay one half of the mortgage debt, is personally liable for only one half thereof: *Logan v. Smith*, 70 Ind. 597. Where a prior mortgagee, with notice of several successive alienations of parts of the mortgaged premises, releases that part which in equity is primarily liable for the payment of his mortgage debt, he will not be permitted to charge other portions with the payment of his mortgage without deducting from the amount due the value of the part released: *Hoy v. Bramhall*, 19 N. J. Eq. 563; see *Gaskill v. Sine*, *post*, p. 105, and note. The notice of such subsequent alienation or incumbrance may be actual or constructive, but the recording of a second deed or mortgage will not operate as constructive notice to a prior mortgagee: *Hoy v. Bramhall*, 19 N. J. Eq. 564.

ASSUMPTION OF MORTGAGE BY JUNIOR OR SENIOR MORTGAGEE.—When a mortgagee assumes and agrees to pay a prior mortgage on the premises, he does not, as a general rule, incur a personal liability for the prior mortgage which can be enforced by the prior mortgagee: *Garnsey v. Rogers*, 47 N. Y. 233; S. C., 7 Am. Rep. 440; *Root v. Wright*, 84 N. Y. 72. So, where the covenant is contained in a deed absolute on its face, but intended as a mortgage: *Garnsey v. Rogers*, 47 N. Y. 233; S. C., 7 Am. Rep. 440; *Arnaud v. Grigg*, 29 N. J. Eq. 482; *Gaffney v. Hicks*, 131 Mass. 124; see also *Ricard v. Sanderson*, 41 N. Y. 179; *Campbell v. Smith*, 71 Id. 26; S. C., 8 Hun, 6. The covenant in this case is not regarded as a promise made by the junior mortgagee to the mortgagor for the benefit of the senior mortgagee, but as a promise for the benefit of the mortgagor only, made to protect his property, by an advance of money to pay the prior debt: *Garnsey v. Rogers*, 47 N. Y. 233; S. C., 7 Am. Rep. 440; *Root v. Wright*, 84 N. Y. 72.

If a senior mortgagee purchases the mortgaged premises, and assumes the payment of a junior mortgage, the amount of which is deducted from the price of the land, the senior mortgage is merged and discharged, and the junior mortgage takes precedence: *Fowler v. Fay*, 62 Ill. 375; *Huebsch v. Schel*, 81 Id. 281. But a prior mortgagee, who has received from the mortgagor a release of the equity of redemption subject to a second mortgage, not in payment of his mortgage, but as an additional security, will not be bound to pay the second mortgage debt, although his deed may recite that it is made in consideration of his mortgage and the balance due on the second mortgage; and he may show by parol what was the real consideration: *Huebsch v. Schel*, 81 Ill. 281; see also *Sidders v. Riley*, 22 Id. 109; *Booth v. Hynes*, 54 Id. 363.

ASSUMPTION OF MORTGAGE BY MARRIED WOMAN.—A married woman, in a conveyance to her own separate use or benefit, may make a covenant binding upon her to assume and pay an existing mortgage. Her coverture is no de-

fense, since the liability is contracted upon the purchase of land in her own name, which thus becomes her separate estate, and her covenant is an obligation to pay a portion of the purchase-money, and is, therefore, for the benefit of her separate estate: *Vrooman v. Turner*, 8 Hun, 78; S. C., 69 N. Y. 230; *Flynn v. Powers*, 35 How. Pr. 279; S. C., 36 Id. 239; *Ballin v. Dillaye*, 37 N. Y. 35; *Cashman v. Henry*, 75 Id. 103; S. C., 55 How. Pr. 234, reversing 44 Super. Ct. 93; *Huyler's Ex'rs v. Atwood*, 26 N. J. Eq. 504; S. C., 28 Id. 275; *Coolidge v. Smith*, 129 Mass. 554.

An assumption of a mortgage contained in a deed made to a married woman, without her knowledge or consent, and never delivered to her, does not bind her: *Culver v. Badger*, 29 N. J. Eq. 74. But where, though the deed was made without her knowledge and consent, nevertheless, soon after it was recorded she became aware that the land had been conveyed to her and claimed to be the owner of it, it was held that a finding that she had assented to the conveyance was warranted by the facts, and a ruling that she was bound by the recital in the deed was justifiable: *Coolidge v. Smith*, 129 Mass. 554.

In a state where the enabling statute authorizes a married woman to make contracts only with respect to her own property, she can contract no liability as surety for her husband: *West v. Laraway*, 28 Mich. 464; *De Vries v. Conklin*, 22 Id. 255; and consequently cannot be held liable on a covenant of assumption in her husband's deed of his land: *Kitchell v. Mudgett*, 37 Id. 81.

CLEVELAND v. HAVENS.

[2 BRASLEY'S CHANCERY, 101.]

WHEREAS TERMS OF BEQUEST OF PERSONALTY are such as would in devise of realty create an estate-tail in the devisee, it operates as an absolute gift of the personality, and a bequest over on the failure of issue of the first taker is void.

ESTATE VESTS ABSOLUTELY IN FIRST TAKER, when a gift is to him and his issue, or to him and the heirs of his body, and the limitation over is upon an indefinite failure of issue.

FIRST LEGATEE TAKES ESTATE FOR LIFE ONLY, AND LIMITATION OVER IS GOOD when the limitation over is upon a definite failure of issue, and it is immaterial whether the gift be of the subject itself or only of the use.

COURT WILL NOT DECREE THAT LEGACY WITH LIMITATION OVER VESTS ABSOLUTELY IN FIRST LEGATEE upon a bill by such legatee to obtain a construction of the bequest in which the executor is made defendant, merely because the executor consents to such decree, and though the real parties in interest, who take under the limitation over, and who are also made parties defendant, fail to appear and make defense, the court will not decree against them contrary to the clear right of the case.

WILLS OF BOTH REAL AND PERSONAL ESTATE MUST BE IN WRITING, and parol evidence is not admissible to add to, contradict, or vary their contents.

BILL in equity by Cleveland and wife against Havens, executor, etc., and others. The opinion states the case.

Lewis R. Grover, for the complainants.

By Court, GREEN, Chancellor. The bill is filed by a legatee under the will of Eliza H. Marsiglia, to settle the construction of a bequest contained in the will, and to enforce the payment of the legacy. The bequest is as follows: "I give, devise, and bequeath the remaining one equal half part of all the rest, residue, and remainder of said trust property, and of any and all other property, of every kind and description, belonging to me at the time of my decease, to my said daughter Catharine and to her lawful issue. But in case of the death of my said daughter Catharine without having lawful issue living at the time of her decease, then I give, devise, and bequeath the same to my said daughter Ada, and to her lawful issue. And should both of my said daughters so die without leaving lawful issue surviving, then I give, devise, and bequeath the same, or so much thereof as may remain, to John Pienezoe and Frances Chanwand (my children by my former husband, John J. Chanwand), equally, and to their heirs forever."

The property disposed of by the bequest was the sum of six hundred dollars in money.

The will purports to give a legacy to Catharine, the daughter of the testatrix, and on her death to her issue; but if she died without issue living at the time of her death, then over (to Ada, another daughter of the testatrix).

It is claimed on the part of the complainant that, under the terms of the gift, the legacy vests absolutely in Catharine, the first legatee.

Where the terms of a bequest of personalty are such as would, in a devise of real estate, create an estate-tail in the devisee, it operates as an absolute gift of the personalty, and a bequest over on the failure of issue of the first taker is void: *Lyon v. Mitchell*, 1 Madd. 467, 1st Am. ed. 253; 2 Roper on Legacies, 1520, c. 22, sec. 1.

When the gift is to A and his issue, or to A and the heirs of his body, and the limitation over is upon an indefinite failure, the estate vests absolutely in the first taker.

But when the limitation over is upon a definite, not an indefinite, failure of issue, the first legatee takes an estate for life only, and the limitation over is good.

In the present case, the bequest over is made upon a definite failure of issue. It is upon the death of Catharine without leaving lawful issue living at the time of her death. Terms cannot be more explicit. The limitation over is upon a definite failure of issue. The bequest over in such case will be

supported. The first legatee takes but a life interest, and it is immaterial whether the gift be of the subject itself or only of the use: *Hyde v. Parrat*, 1 P. Wms. 1; *Tissen v. Tissen*, Id. 502; *Upwell v. Halsey*, Id. 652.

The terms of the will admit no doubt that the complainant is entitled only to the use of the money for life; that upon her death, leaving issue, the principal vests absolutely in the children; and in default of issue, then over to the other legatees named in the will.

The case is not altered by the answer of the executor. His consent to a decree against him cannot affect the rights of the real parties in interest. He is a mere trustee. He takes no interest under this part of the will. The parties really in interest are those to whom the money is given upon the death of the complainant, and though they fail to appear and make defense, the court will not decree against them contrary to the clear right of the case. But their interest is contingent only, and it may well be doubted whether, even with their consent, the court would be justified in making the decree prayed for, or whether such decree, if made, would afford protection to the executor against the claims of those whose interests may under the provisions of the will accrue hereafter.

The executor not only assents to the decree as prayed for, but he also admits the truth of sundry charges in the bill, and states facts, the benefit of which is claimed by the complainant as establishing the truth of the charges made by the bill.

It is stated, among other things, by the answer of the executor, that he drew the will in question at the request and under written instructions from the testatrix, and that he was instructed to give the trust money in the bill mentioned, being the sum of six hundred dollars, then in his hands as trustee, absolutely to Catharine, one of the complainants; that he intended so to draw the will; he knows the testatrix so understood the will to read, and the executor himself so construed it, and he proffers himself ready to pay the money to the complainants under the order and protection of the court.

Aside from all exceptions that might be taken to these statements and admissions on the part of the executor, as evidence to affect the rights of parties having interests under the provisions of the will, treating it as legal and competent evidence in the cause, is the evidence in itself competent? It embraces two objects. Its purpose is to prove: 1. That the will was not drawn in pursuance of the written instructions given by the

testatrix; 2. That the testatrix and the scrivener understood the will differently from its legal import. But parol evidence is competent for neither of these purposes.

The law requires wills, both of real and personal estate, to be in writing, and parol evidence is not admissible to add to, contradict, or vary their contents. "No principle," says Mr. Jarman, "connected with the law of wills is more firmly established or more familiar in its application than this; and it seems to have been acted upon by the judges, as well of early as of later times, with a cordiality and steadiness which show how entirely it coincided with their own views:" 1 Jarman on Wills, 349.

The judgment of a court in expounding a will is to be simply declaratory of what is in the instrument: Wigram on Wills; Greenl. Ev., sec. 290, note; 1 Jarman on Wills, 358.

There are no latent ambiguities to be removed. The words of the will are clear, and have a definite and well-ascertained meaning. In such case, no extrinsic evidence to show a different meaning can be admitted: See the cases cited in 1 Jarman on Wills, 348, note 1; *Mann v. Mann*, 1 Johns. Ch. 231.

These principles have been repeatedly recognized in this state: *Hand v. Hoffman*, 8 N. J. L. 71.

There is nothing in the case that will warrant a decree in favor of the complainants.

The bill must be dismissed.

PAROL EVIDENCE IS NOT ADMISSIBLE TO VARY, CONTRADICT, OR ADD TO TERMS OF WILL: *Vickery v. Hobbs*, 73 Am. Dec. 238; *Yates v. Cole*, 59 Id. 602; *Yundt's Appeal*, 53 Id. 496, and notes. No proof, however conclusive in its nature, can be admitted with a view of setting up an intention of the testator inconsistent with the will itself: *Griscom v. Everts*, 40 N. J. L. 408, citing the principal case.

LIMITATION OVER ON DEATH WITHOUT ISSUE, VALIDITY OF: See *Presley v. Davis*, 62 Am. Dec. 396, and cases cited in the note 401.

WHERE WORDS IN WILL WOULD CREATE ESTATE-TAIL IN LANDS, the same words in a bequest of chattels will carry the absolute estate: *Swain v. Rascoe*, 33 Am. Dec. 720; *Maulding v. Scott*, 56 Id. 296; *Myers v. Anderson*, 47 Id. 537.

LEGATEE TAKES ABSOLUTE INTEREST WHEN LIMITATION OVER IS TOO REMOTE: *Shepherd v. Shepherd*, 46 Am. Dec. 41; see *Shultz v. Shultz*, 60 Id. 335.

CRAFT v. SNOOK'S EXECUTORS.

[2 BRASLEY'S CHANCERY, 121.]

BEQUEST OF INTEREST OR PRODUCE OF FUND TO LEGATEE OR IN TRUST FOR HIM, without any limitation as to continuance, bequeaths also the principal.

EXECUTORS ARE ENTITLED TO THEIR COSTS where they have merely sought for their security to have the construction of the will settled.

BILL in equity filed by Enoch Craft and others against the executors of Enoch Snook. The opinion states the case.

Isaac W. Lanning, for the complainants.

By Court, GREEN, Chancellor. The bill in this case is filed to obtain a judicial construction of the will of Enoch Snook, late of the county of Mercer, deceased.

The testator, among other legacies and provisions of his will, gives and bequeaths as follows, viz.: "I give and bequeath unto my sister, Elizabeth Craft, the interest upon the sum of one thousand dollars, to be paid to her annually during her life; and after her decease the interest to be equally divided between Enoch Craft and Mahlon Craft. . . . In case there shall be anything remaining over and above paying the legacies above mentioned and bequeathed, then I order the same to be placed at interest, and the interest thereof annually to be divided between Enoch Craft, Mahlon Craft, Samuel Craft, Alexander Snook, Emley Snook, Eden Snook, Peter Johnston Snook, and Peter Hunt." The will contains no disposition of the principal of the one-thousand-dollar legacy or of the residue, nor is there any limitation of the time during which the interest is to be paid. Elizabeth Craft, the sister of the testator, received the interest upon the sum of one thousand dollars, according to the directions of the will, during her life. She died, leaving Enoch Craft and Mahlon Craft surviving. The legatees, as well of the interest of the specific legacy as of the residue, now claim that they are entitled to the principal sum of which the interest is thus bequeathed to them.

The general principle has been long and well settled that when the "interest" or "produce" of a fund is bequeathed to a legatee, or in trust for him, without any limitation as to continuance, the principal will be regarded as bequeathed also: *Elton v. Sheppard*, 1 Bro. C. C. 532; *Philipps v. Chamberlaine*, 4 Ves. 51; *Page v. Leapingwell*, 18 Id. 463; *Stretch v. Watkins*, 1 Madd. 253; *Clough v. Wynne*, 2 Id. 188; *Adamson v. Armitage*,

19 Ves. 416; *Earl v. Grim*, 1 Johns. Ch. 494; 2 Williams on Executors, 3d Am. ed., 1027.

There is nothing on the face of the will in question to indicate a different intention. On the contrary, unless this construction be adopted, the testator died intestate as to the bulk of his property. He bequeathed, not the principal, but the interest money, of a large portion of his estate. Such obviously was not his intention.

The legatees of the interest of the one-thousand-dollar legacy and of the residue are entitled to receive the principal of the legacies respectively.

The executors are entitled to their costs, as they have merely sought, for their security, to have the construction of the will settled.

If the parties agree as to the amount now due upon the respective legacies, there is no need of a reference; otherwise, let it be referred to a master to take an account.

BEQUEST OF INCOME OF PERSONALTY WITHOUT LIMIT AS TO TIME is equivalent to a gift of the principal: *Gulick v. Gulick's Ex'rs*, 27 N. J. Eq. 500; *Hutton v. Read*, 32 Id. 506, citing the principal case. A bequest to the wife of the use and improvement of personal property during her widowhood is an absolute gift of the property, when there is no limitation over by way of remainder: *Smith v. Gates*, 1 Am. Dec. 38.

SCHENCK v. CONOVER.

[3 BRASLEY'S CHANCERY, 220.]

COURT OF EQUITY UPON SALE OF LAND UNDER ITS DECREE WILL ENFORCE DELIVERY OF POSSESSION to the purchaser by injunction and writ of assistance, without driving him to an action of ejectment, provided the possessor does not claim by title paramount.

COURT OF EQUITY WILL GIVE FULL EFFECT TO ITS DECREE FOR SALE and conveyance of mortgaged premises by putting the purchaser into possession.

PROPER MODE OF PROCEEDING BY PURCHASER AT FORECLOSURE SALE TO OBTAIN POSSESSION IS: 1. A demand of possession by the purchaser of the tenant in possession, accompanied by an exhibit of the deed from the sheriff or master; 2. Order to deliver possession; 3. Injunction; and 4. Writ of assistance; though it seems that the injunction may be dispensed with.

WRIT OF ASSISTANCE WILL ISSUE AS WELL WHEN SPECIAL ORDER IS MADE AFTER SALE for delivery of possession as when the direction for delivery of possession is included in the decree.

WRIT OF ASSISTANCE WILL BE GRANTED AT INSTANCE OF PURCHASER AFTER SALE as well as on the application of the complainant; to a stranger to the record, who purchases at a foreclosure sale, as well as to the mortgagee.

WRIT OF ASSISTANCE MAY BE MADE, NOT ONLY AGAINST DEFENDANT, but also against any party in possession under him, or by title not superior to his.

EXERCISE OF POWER TO GRANT WRIT OF ASSISTANCE RESTS IN SOUND DISCRETION OF COURT, and the power will never be exercised in a case of doubt, nor under color of its exercise will a question of legal title be tried or decided.

IN STRICT FORECLOSURE, PLAINTIFF IS LEFT TO HIS EJECTMENT to obtain possession from the mortgagor.

MOTION for an order on the defendant to deliver the possession of lands sold on foreclosure.

Richey, for the motion.

W. Halsted, contra.

By Court, GREEN, Chancellor. A decree of foreclosure, and for the sale of the mortgaged premises, having been made in this cause, a writ of *feri facias* issued to the sheriff of Hunterdon, by virtue of which the premises were sold and conveyed to John A. Carroll. Carroll, having received his title, and possession of the premises having been demanded and refused, now applies to the court for an order upon the defendant to deliver possession. The order is asked for as the foundation of an application for a writ of injunction and of assistance.

An affidavit of Conover was by consent read upon the hearing; but there is nothing in the facts stated in the affidavit which is deemed material to the question in controversy.

The objection to the application is, that the court have no power to make the order applied for, and that it is not warranted by the practice of this court.

The practice of putting the purchaser into possession of premises purchased under the decree of this court is of recent origin. The earliest case was that of *Grant v. Quinan*, in 1853. The case was not contested. In 1854 a similar order was made in the case of *Kennedy v. Vreeland*. This case was contested, and an appeal was taken from the order of the chancellor. The power of the court was not seriously contested, the appellant's point being that "the remedy (unusual in this state), by writ of assistance, is not properly grantable in this case, because proceedings are pending in the court of chancery to set aside the petitioner's title for good and sufficient causes." The order of the chancellor was unanimously affirmed at March term, 1855. Since then similar orders have been of frequent occurrence. It might, therefore, be deemed a sufficient answer to the objection to say that the order asked is in

accordance with the established practice of this court, and that the practice has been sanctioned by the decision of the court in the last resort.

But inasmuch as the propriety of the practice and the power of the court to adopt it are now drawn directly in question, and as it has not the sanction of long-established usage, it may be well to examine both its foundation and its policy.

In *Roberdeau v. Rous*, 1 Atk. 543, Lord Hardwicke said the delivery of the possession of lands may be enforced *in personam*, which was the ordinary way; but the writ of assistance to put persons in possession as by way of injunction is of more modern date. This was in 1738.

In the later case of *Penn v. Lord Baltimore*, 1 Ves. sen. 444, Lord Hardwicke said: "The practice of putting a party into possession in a suit concerning lands within the jurisdiction of the court was first begun and settled in the reign of James I., and has ever since been done by injunction or writ of assistance to the sheriff."

This statement of Lord Hardwicke as to the origin of the practice, says Mr. Eden, is clearly a mistake, for many precedents for injunctions to deliver possession after a decree and a commission or writ of assistance to the sheriff are in the printed reports as early as the reign of Queen Elizabeth; and in a manuscript book of orders (which appears to have been taken from the registrar's books in the Hargrave collection), there are a great many precedents of injunctions to deliver possession of lands after a decree, in the time of Henry VIII., Edward VI., and Mary: Eden on Injunctions, 261, Waterman's ed., vol. 2, p. 425.

In *Dove v. Dove* (before the lords commissioners in 1783), by the decree, the estate of the testator was to be sold. The defendant, the widow, who had got into possession under some claim of jointure or dower, was directed to account. The estate was sold, and the purchaser applied to the widow to deliver possession, which she refused. He then applied to the court, and obtained possession by an order, injunction, and writ of assistance: Dickens, 617; S. C., 1 Bro. C. C. 375; 1 Cox, 101.

In the report of this case by Dickens, the course of proceeding to obtain possession by injunction and the writ of assistance are fully stated.

The practice was adopted also in *Stribley v. Hawkie*, 3 Atk. 275; and in *Huguenin v. Baseley*, 15 Ves. 180.

The general result of the cases is, that where lands are

within the jurisdiction of the court, and the defendant refuses to perform the decree by giving the plaintiff possession, the court will enforce its decree by the writ of assistance: Wyatt's Prac. Reg., London ed. 1800, 207; 2 Madd. Ch. Pr., ed. 1822, 469; 1 Fonbl. Eq. 32, note *q*; 1 Newland's Ch. Pr. 390; 1 Smith's Ch. Pr. 447.

In *Garretson v. Cole*, 1 Har. & J. 387, Chancellor Hanson said an injunction for possession is not a new thing in a court of equity. It has long been used in England, and it would disgrace our laws and administration of justice, if, after a title to land had been established by the adjudication of a court, there could be no way of obtaining possession but after obtaining judgment in ejectment.

In *Buffum's Case*, 13 N. H. 14, Chief Justice Parker, in delivering the opinion of the court, says: "The decree in this case may be regarded as establishing an equitable title in the complainant, so that without the execution of any deed by the defendant in pursuance of it, the court would put the plaintiff in possession by writ of assistance, if necessary." See also *Devaucene v. Devaucene*, 1 Edw. Ch. 272.

These cases clearly show the long-established and familiar practice of the court of chancery wherever the conveyance of real estate is decreed, to compel the defendant to surrender the possession to the plaintiff; in other words, a court of equity will enforce its own decree, as between the parties, without compelling a resort to an action at law.

The same practice is adopted under sales before a master in the English court of chancery: 2 Smith's Ch. Pr. 213. The application, however, is made, not by the purchaser, but by the solicitor of the vendor at the instance of the purchaser.

So on a bill by a mortgagor to redeem the mortgaged premises, the court will order the defendant to deliver up possession to the plaintiff without putting the plaintiff to his ejectment: *Yates v. Hambly*, 2 Atk. 360; Seaton's Decrees, 146.

In a strict foreclosure, the practice is otherwise. In such case, the court does not direct the mortgagor to deliver up the possession of the mortgaged premises to the plaintiff, but leaves the plaintiff to his ejectment: *Sutton v. Stone*, 2 Atk. 101; Seaton's Decrees, 140.

The reason for this distinction in practice seems to be that on a bill to redeem there is a decree for a reconveyance by the mortgagee to the mortgagor. The mortgagor acquires title

under the decree of the court, and the court will perfect his title, and give him the benefit of the decree by putting him in possession; whereas under a bill for foreclosure the complainant has the legal title, and only asks that the equity of redemption be foreclosed. He acquires no title under the decree of the court. No conveyance is ordered, and no delivery of possession is necessary to give effect to the decree.

It becomes, then, a mere question of practice whether a court of equity will, in the exercise of its undoubted power, give full effect to its decree for the sale and conveyance of mortgaged premises by putting the purchaser into possession. The subject was fully examined, and the practice adopted by Chancellor Kent in *Kershaw v. Thompson*, 4 Johns. Ch. 609. In a luminous opinion in which he examines both the power of the court to adopt the practice and the policy of its adoption, he says: "The distribution of power among the courts would be injudicious, and the administration of justice exceedingly defective and chargeable with much useless delay and expense, if it were necessary to resort in the first instance to a court of equity, and afterwards to a court of law, to obtain a perfect foreclosure of a mortgage. It seems to be absurd to require the assistance of two distinct and separate jurisdictions for one and the same remedy; viz., the foreclosure and possession of the forfeited pledge. But this does not, upon due examination, appear to be the case; and it may be safely laid down, as a general rule, that the power to apply the remedy is co-extensive with the jurisdiction over the subject-matter. A bill to foreclose the equity of redemption is a suit concerning the realty and *in rem*, and the power that can dispose of the fee must control the possession. The parties to the suit are bound by the decree, their interests and rights are concluded by it, and it would be very unfit and unreasonable that the defendant, whose right and title has been passed upon and foreclosed by the decree, should be able to retain the possession in despite of the court. This is not the doctrine of the cases, not the policy of the law."

This decision has been approved, and the practice adopted in numerous cases: *Ludlow v. Lansing*, Hopk. 231; *Valentine v. Teller*, Id. 422; *Vanhook v. Throckmorton*, 8 Paige, 38; *Dorsey v. Campbell*, 1 Bland, 363; *McKomb v. Kankey*, Id. 363, note c; *Aldrich v. Sharp*, 3 Scam. 261; *Hart v. Lindsay*, Walk. Ch. 72; *Benhard v. Darrows*, Id. 519; *Commonwealth v. Ragsdale*, 2 Hen. & M. 8.

These cases show that at this day, upon a sale under a decree of a court of chancery, the delivery of possession to the purchaser by injunction and writ of assistance is well settled, and of right when the possessor does not claim to hold by title paramount to the parties.

The case has hitherto been considered solely in reference to the general powers of the court, without regard to any statutory provision, but the practice is certainly warranted, if not expressly authorized, by our statute: Nix. Dig. 95, sec. 63; R. L. 1820, p. 702, sec. 4.

By a clause of that section, it is enacted that the complainant having obtained a decree, it shall be lawful for the said court "to cause, by injunction, the possession of the effects and estate demanded by the bill, and whereof the possession or a sale is decreed, to be delivered to the complainant, or otherwise, according to such decree, and as the nature of the case may require."

The Maryland statute of 1785 is identical with our own. In *McKomb v. Kankey*, 1 Bland, 363, note c, decided in 1807, possession was delivered to a purchaser at a sheriff's sale of mortgaged premises against the lessee of the mortgagor. The chancellor said: "The general power of the court of chancery to issue an injunction directing possession to be delivered is sanctioned by the practice in England and by our acts of assembly. The decree for possession and injunction is a process demandable of right as much as an attachment or other execution, and ought not to be refused when the power is considered to exist. An application for possession in such case is founded on the general powers of the court and on the act of 1785."

The proper mode of proceeding where the delivery of possession is not included in the decree, as settled in *Kershaw v. Thompson*, 4 Johns. Ch. 609, and as hitherto adopted in this court, is a demand of possession by the purchaser of the tenant in possession, accompanied by an exhibit of the deed from the sheriff or master, order to deliver possession, injunction, and writ of assistance. The preliminary orders are made upon notice and affidavits; the last writ issues of course and without notice: Barb. Ch. Pr. 441; see the Forms, Hoffman's Master, 893; Seaton's Forms, 424, 425.

In *Valentine v. Teller*, Hopk. 422, it was held that the writ of assistance was the first and only process necessary for giving possession, and that the injunction was not necessary.

And by the present English practice, regulated by 1 Wm. IV., c. 36, upon proof of the service of the order for the delivery of possession, of demand of possession, and of refusal to comply therewith, the writ of assistance issues in the first instance; the writ of injunction as well as the writ of attachment used in the ancient practice, being dispensed with: 2 Daniell's Ch. Pr. 1280.

The injunction is in fact but a repetition of the order of the court to deliver possession, and it would seem that it might be advantageously dispensed with.

The cases cited meet all the objections that were urged upon the argument to granting the relief asked for in this case. They show that the writ of assistance will issue as well when a special order is made for the delivery of possession after a sale as when the direction is included in the decree; that it will be granted at the instance of the purchaser after a sale as well as on the application of the complainant; and that it may be made, not only as against the defendant, but against any party in possession under him, or by title not superior to his. It is scarcely necessary to add that the exercise of the power rests in the sound discretion of the court. It will never be exercised in a case of doubt, nor under color of its exercise will a question of legal title be tried or decided. With these limitations of its exercise, I believe that the practice which has been adopted will be found both safe and salutary. The practice of delivering possession of mortgaged premises to the purchaser under a sale made by the authority of this court is, as has been said, of recent adoption in this state. It is not, however, the exercise of a new power. It is but the more extended application of a familiar power which has been exercised in the court of chancery for centuries.

WRITS OF ASSISTANCE: See *Wilson v. Polk*, 51 Am. Dec. 151, and note treating this subject 152-158. A court of equity will put the purchaser into possession of premises sold and conveyed in pursuance of its decree, but in so doing it will not interfere with questions of title, and will not attempt in cases of doubt to settle the rights of any party claiming possession by title paramount to that of the mortgagee or other party in whose favor the decree was made: *Thomas v. De Baum*, 14 N. J. Eq. 39; *Vasometer v. Borden*, 25 Id. 414; *Barton v. Beatty*, 28 Id. 412, citing the principal case. The remedy of the mortgagor in equity by bill for redemption is complete, and the relief speedy and efficacious, by the use of the writ of assistance to put the mortgagor into possession of the mortgaged premises, where the mortgagee has entered and held possession: *Shields v. Lonsar*, 34 N. J. L. 506, citing the principal case.

HARING v. KAUFFMAN.

[2 BRASLEY'S CHANCERY, 397.]

TO EFFECT REGULAR SERVICE OF INJUNCTION, writ itself under seal of court must be shown to the party against whom it issues, and a true copy thereof delivered to him.

PERSONAL SERVICE OF INJUNCTION WILL BE DISPENSED WITH where the party is out of the state or cannot be found.

MODERN PRACTICE IS FOR COURT BY SPECIAL ORDER TO DISPENSE WITH PERSONAL SERVICE of injunction, where the defendant avoids the service of the writ or other circumstances render such order necessary or proper.

COURT MAY PUNISH VIOLATION OF ITS ORDER THOUGH INJUNCTION BE NOT SERVED, if it appears that the defendant knew of its existence.

ORDER WILL BE MADE DECLARING SERVICE OF INJUNCTION VALID where defendant has been legally served with subpoena and a copy of the injunction has been left at his dwelling-house, and it appears from affidavits that he is endeavoring to avoid service of the injunction.

ORDER DECLARING SERVICE OF INJUNCTION VALID WILL BE MADE where defendant and his wife are non-residents, and the writ was served out of the state upon the defendant personally, and it is shown by affidavits that the wife after diligent search could not be found; even though the defendant has not been previously brought within the jurisdiction of the court by service of subpoena or otherwise.

COPY OF ORDER DECLARING SERVICE OF INJUNCTIONS VALID SHOULD BE SERVED upon the defendants, either personally or by leaving it at the dwelling-house of each of them.

MOTION to have service of injunctions declared valid. The opinion states the case.

Lyons, for the complainant.

By Court, GREEN, Chancellor. The bill seeks, among other things, to set aside, as fraudulent, certain conveyances made by John F. Kauffman, the defendant, to Christian Vogel, bearing date on the twenty-seventh of November, 1860, a reconveyance of the same premises, by deed of even date, from Vogel and wife to Eve, the wife of Kauffman, and a mortgage of the same premises from Kauffman and wife to Rose, the wife of Vogel, for two thousand dollars, dated on the sixteenth of April, 1861. An injunction issued to restrain Kauffman and wife from conveying or incumbering the premises, and also to restrain Vogel and wife from transferring the mortgage or collecting the mortgage debt. Kauffman resides in this state; Vogel resides in the city of New York. The subpoena was served personally on the wife of Kauffman, and on Kauffman himself, by leaving a copy at his dwelling-house. The injunction was served personally on the wife of Kauffman, in this state, and a copy left with her at the place of abode of her

husband. The injunction was served upon Vogel, by showing him the original, and leaving a copy with him at his place of abode in the city of New York. The affidavits show that neither Kauffman himself nor the wife of Vogel could be found after diligent search and inquiry. The complainant now moves that the service of the injunction, thus made as aforesaid, be deemed and taken to be a valid and sufficient service thereof upon all the said defendants.

To effect a regular service of an injunction, the writ itself, under the seal of the court, must be shown to the party against whom it issues, and a true copy thereof delivered to him: Wyatt's Prac. Reg. 232; 1 Newland's Ch. Pr. 231; 3 Daniell's Ch. Pr. 1818; 1 Eden on Injunctions, Waterman's ed., 93; 1 Barb. Ch. Pr. 590.

Personal service will be dispensed with where the party is out of the state or cannot be found.

It would seem, from some of the earlier cases, that leaving the injunction at the dwelling of the defendant was a sufficient service, without a special order of the court to warrant or confirm it. Thus, in the nineteenth and twenty-second years of Elizabeth, an attachment was ordered, upon proof that the writ of injunction was left at the house of the defendant, and that he had disobeyed it: *Holgate v. Grantham*, Cary, 82; *Bodnam v. Morgan*, Id. 144.

The modern practice is for the court, by special order, to dispense with personal service, where the defendant avoids the service of the writ, or other circumstances render such order necessary or proper: Wyatt's Prac. Reg. 232; Eden on Injunctions, Waterman's ed., 76.

In *Pearce v. Crutchfield*, 14 Ves. 206, it was ordered that service of the injunction at the house, which appeared to be the last place of abode of the defendant, though afterwards apparently shut up, should be good service.

The propriety of the order asked for, as regards the service of the writ upon Kauffman, is clear. He is within the state, has been legally served with process of subpoena, and a copy of the injunction has been left at his dwelling-house. The affidavits, moreover, warrant the belief that he is endeavoring to avoid the service of the injunction.

There is more room for question as to the propriety of the order in regard to the service of the writ on Vogel and wife. It is true that the writ was served personally upon Vogel, and a copy left with him at his dwelling-house, the wife not being

found, and the affidavits warranting the belief that she, also, is endeavoring to avoid the service of the injunction. The mode of service is substantially the same in both cases; but the material difference lies in the fact that the service upon Vogel and wife was made out of the state, the defendant not having been previously brought within the jurisdiction of the court by the service of a subpoena. The mode prescribed by the statute for effecting the appearance of the defendant has, however, been adopted, and is in the process of completion. I incline to think that no principle or rule of practice will be violated by maintaining the legality of the service. The ends of justice manifestly require it. All that is required to enable the court to enforce obedience to its process is that the defendant should have knowledge of the order for the injunction. The court may punish the violation of the order, though the injunction be not served, if it appear that the defendant knew of its existence: *Kimpton v. Eve*, 2 Ves. & B. 349; *Hearn v. Tennant*, 14 Ves. 136; *Skip v. Harwood*, 3 Atk. 564; *James v. Downes*, 18 Ves. 522; 1 Eden on Injunctions, 94; Drewry on Injunctions, 399; *McNeil v. Garrett*, 1 Cr. & Ph. 98; *Hull v. Thomas*, 3 Edw. Ch. 236.

If the injunction was properly granted, the service, though out of the state, answers all the ends for which it was intended. It apprises the party of the order of the court.

The motion will be granted, and the service of the injunction upon all the defendants declared valid.

It is proper that a copy of this order should be served upon the parties, either personally or by leaving a copy at the dwelling-house of each of them, within twenty days from the date of the order.

Order accordingly.

PERSON IS BOUND BY INJUNCTION, THOUGH NOT SERVED, IF HE HAS NOTICE THEREOF: *Farnsworth v. Fowler*, 55 Am. Dec. 718, and note 722, 723; note to *People v. Sturtevant*, 59 Id. 548. A party is liable for a breach of an injunction, after notice of its having been obtained, although the order has not been served upon him: *In re Feeny*, 4 Bank. Reg. 70; *Cape May etc. R. R. Co. v. Johnson*, 35 N. J. Eq. 424, citing the principal case. A writ of *certiorari*, like a writ of injunction, may be served by any person in any manner by means of which the persons to whom it is directed may reasonably be made aware of the fact of the issuing of the writ and of its requirement. If the original is in fact delivered to the persons to whom it is directed, in such manner as to communicate the information that they are required to obey it, the service is sufficient: *State v. Dwyer*, 41 N. J. L. 95, citing the principal case.

GASKILL v. SINE.

[2 BRANLEY'S CHANCERY, 409.]

WHERE TWO LOTS ARE MORTGAGED TO SECURE SAME DEBT, and the mortgagor subsequently conveys one of the lots, the remaining lot is primarily liable under the mortgage; and it is immaterial that the consideration for the conveyance was not valuable, but natural love and affection.

PURCHASER FROM MORTGAGOR OF ONE OF TWO LOTS MORTGAGED FOR SAME DEBT is not affected by a release of the remaining lot, executed by the mortgagee to the mortgagor after the sale without the purchaser's consent.

WHERE TWO LOTS ARE SUBJECT TO SAME MORTGAGE, AND MORTGAGOR CONVEYS ONE OF THEM, and the mortgagee afterwards releases to the mortgagor the remaining lot, if the lot released is sufficient to satisfy the entire debt, the mortgagee cannot resort to the first lot; but if sufficient to satisfy only a part of the debt, the first lot in the hands of the grantee will be answerable for the deficiency; accordingly, on a bill to foreclose, reference will be ordered to ascertain the amount due upon the mortgage and the value of the premises released.

NEW MATTER OF DEFENSE NOT RESPONSIVE TO BILL MUST BE SUSTAINED BY EVIDENCE.

UNDER PRAYER FOR SALE OF ENTIRE MORTGAGED PREMISES TO PAY WHOLE DEBT, complainant may have a decree to sell such portion of the premises to pay such part of the debt as the evidence may warrant.

BILL filed by Job H. Gaskill against Sine and wife. The opinion states the case.

Wilson, for the complainant.

Merritt, for the defendants.

By Court, GREEN, Chancellor. The complainant's bill is filed to foreclose a mortgage given by Israel Gaskill to James S. Budd, on the the thirtieth of August, 1849, upon two lots of land. On the sixth of October, 1849, the mortgagor conveyed lot No. 2 to Louisa Sine, the wife of the defendant, by deed with covenant of general warranty. On the fifteenth of July, 1850, the mortgagee released to the mortgagor lot No. 1, and on the fifth of August, 1850, assigned the mortgage to the complainant.

Sine and wife, who claim title to the lot No. 2, insist, by way of defense, that lot No. 1, having been retained by the mortgagor after the sale of the lot to the defendants, the lot so retained must be first subject to the mortgage debt, and the lot of the defendants can only be resorted to to make up any deficiency that may exist upon such sale, and that the mortgagee, having released to the mortgagor all right to the lot retained by him after the conveyance to the defendants, has no

right to look to the defendants' lot for any part of the mortgage debt, but that the same is released from the incumbrance of the mortgage. The facts which constitute this ground of defense are admitted, and their effect upon the rights of the parties is obvious. The defendants, as the purchasers of one of the lots mortgaged, are entitled to throw the whole incumbrance upon the lot retained by the mortgagor, if that is sufficient to discharge the debt, and the mortgagee can only resort to the defendants' lot to supply the deficiency, if any exist.

A release subsequently given by the mortgagee to the mortgagor of the mortgage upon the lot remaining unsold, without the assent of the purchaser of the lot sold, will not prejudice the rights of the purchaser. This was declared by the late chancellor to be the effect of these admitted facts upon the rights of the parties in this case when the question was before him. The doctrine is a familiar one, and is sustained by numerous authorities: *Mickle v. Rambo*, Saxton, 501; *Shannon v. Marselis*, Id. 413; *Stevens v. Cooper*, 1 Johns. Ch. 425 [7 Am. Dec. 499]; *Guion v. Knapp*, 6 Paige, 35; *Patty v. Pease*, 8 Id. 277 [35 Am. Dec. 683].

There is no foundation for the idea that the subsequent release by the mortgagee of the lot retained by the mortgagor deprived the mortgagee of all remedy against the first lot. It can produce that result only where the lot released is sufficient to satisfy the entire mortgage debt. The release in no wise affects the interest of the purchaser of the lot first sold. He is entitled, in any event, to throw the mortgage on the other lot, so far as it will satisfy the debt. If the lot released is sufficient to satisfy the entire debt, the mortgagee cannot resort to the lot first sold. He must bear the loss. If sufficient to satisfy only a part of the debt, the lot in the hands of the purchaser will be answerable for the deficiency.

A second ground of defense presented by the answer is, that the complainant acted as the agent or trustee of the mortgagor in procuring the assignment of the mortgage, and that the consideration paid for the assignment was the money of the mortgagor. No replication having been filed, the answer upon the former hearing was taken as true, and the chancellor held that the bill, upon this state of the facts, was virtually by the mortgagor himself; that the complainant had no equity, and that the bill must be dismissed. The decree having been opened, a replication filed, and evidence taken upon this part of the defense, the question is now presented whether this de-

fense is sustained in point of fact. The defense consists of new matter not responsive to the bill, and must be sustained by evidence. No evidence is produced in its support. The fact that the complainant is a brother of the mortgagor, and that he holds a conveyance of his real estate in trust for him, amounts to nothing. It is shown affirmatively by the complainant that the consideration was advanced by himself, and there is no proof that any part of it was received directly or indirectly from the funds of the mortgagor.

The fact that the conveyance by the mortgagor to the defendant's wife was not made for a valuable consideration, but for natural love and affection, will not affect the rights of the parties. The deed contained a covenant of warranty. It was duly recorded. The assignee of the mortgage took the assignment with full notice of the rights of the defendants.

The objection that the prayer of the bill is defective is without foundation. The complainant might have the relief to which he has shown himself entitled under the ordinary prayer of a bill of foreclosure contained in the bill as originally filed. Under a prayer for the sale of the entire mortgaged premises to pay the whole debt, the complainant may have a decree to sell such portion of the premises to pay such part of the debt as the evidence may warrant. But the prayer to the amended bill has anticipated the defendants' objection, and is precisely adapted to the relief granted.

The complainant is entitled to an account and a decree against the defendants for the foreclosure and sale of the lot conveyed to Louisa Sine, to satisfy so much of the mortgage debt as the premises released will be insufficient to satisfy. A reference will be ordered to ascertain the amount due upon the mortgage and the value of the premises released.

LIABILITY OF GRANTEE OF PREMISES MORTGAGED TO PAY OFF MORTGAGE: Note to *Klapworth v. Dressler*, *ante*, p. 69.

WHERE PORTION OF PREMISES MORTGAGED ARE SUBSEQUENTLY SOLD, MORTGAGOR RETAINING RESIDUE, the latter portion should in equity be first subjected to the payment of the mortgage debt: *Bates v. Ruddick*, 65 Am. Dec. 774; *Engle v. Haines*, 43 Id. 624, and note 625; *contra*: *Knowles v. Lawton*, 63 Id. 290. The principal case is cited to this point in *Weatherby v. Slack*, 16 N. J. Eq. 493; *Harrison v. Guerin*, 27 Id. 222.

RELEASE WITH NOTICE OF PORTIONS OF MORTGAGED PREMISES NOT SOLD cannot affect rights of purchasers: *Stevens v. Cooper*, 7 Am. Dec. 499; *Guion v. Knapp*, 29 Id. 741, note 747. Where a mortgagee, with notice of alienations of parts of the mortgaged premises, releases that part which is primarily liable in equity for the payment of the mortgage debt, he cannot be permit-

ted to charge other portions of the premises with the payment of the mortgage, without deducting from the amount due the value of the part released: *Hoy v. Bramhall*, 19 N. J. Eq. 571, citing the principal case.

ANSWER IS NOT EVIDENCE EXCEPT SO FAR AS RESPONSIVE TO BILL; and whenever matter in discharge or avoidance is asserted, or new and substantive claims are advanced, they must be established by proof: *Buck v. Sweeney*, 56 Am. Dec. 681, note 688; *McQueen v. Chouteau's Heirs*, 64 Id. 178; *Paul v. Carver*, Id. 649; *Miles v. Miles*, Id. 362.

SEYMOUR v. LEWIS.

[2 BEASLEY'S CHANCERY, 429.]

WHERE OWNER OF TWO LOTS, UPON ONE OF WHICH IS SPRING, and upon the other of which is a paper-mill to which for many years the water of the spring has been conducted by artificial means, conveys the spring lot without reference to the spring in the deed, either by way of grant or reservation, the grantee takes subject to the easement that the water shall continue to be so diverted.

GRANTEE OF ONE OF TWO TENEMENTS OR OF PORTION OF ENTIRE ESTATE takes it with respect to the tenement or portion retained by the grantor subject to or benefited by all apparent and continuous easements attached to and affecting it at the time of the conveyance.

EVERY GRANT OF THING NATURALLY AND NECESSARILY IMPORTS a grant of it as it actually exists, unless the contrary is provided for.

EASEMENTS ARE NOT RIGHTS DISTINCT FROM TITLE OF LAND and annexed to the person of the owner, but they pass with the title of the land.

ONE WHO HAS RECOGNIZED VALIDITY OF GRANTOR'S TITLE TO PREJUDICE OF GRANTEE by receiving, from the latter, payment of a debt secured by an attachment upon the land as the property of the grantor, is estopped as against such grantee afterwards to set up the fraudulency and invalidity of such title.

BILL in equity by Seymour and Sage against Lewis and others. The opinion states the case.

Richey and Beasley, for the complainants.

Wilson, for the defendants.

By Court, GREEN, Chancellor. In the year 1857, James Gaunt was seised in fee and possessed of two lots or parcels of land and real estate in the city of Trenton. The first consisted of an extensive and valuable paper-mill, with the water privileges and appurtenances, situate on the raceway of the Trenton Water Power Company, and known as the Delaware mill. The second consisted of a lot of land on the south side of Front street, extending in the rear to Washington street, upon which were erected two brick dwellings. Upon the latter lot, there was a valuable spring which furnished a copious

supply of water. The water of the spring had been, by a previous owner of the two lots, as early as 1845 (and probably as early as 1841), diverted, by means of pipes or conduits, from its natural and accustomed channel over the land to the Assanpink creek, to the paper-mill upon the other lot of Gaunt, and was there used in the manufacture of paper. The water continued to be thus diverted and used by all the successive proprietors of the two lots down to the year 1857. It was so used and enjoyed by James Gaunt during his ownership and occupancy of the two lots. During that year, Gaunt became insolvent. By a deed dated on the thirty-first of August, 1857, he conveyed the two houses and lot on Front street to his father-in-law, Griffen Green. On the twenty-sixth of September, 1857, he leased the paper-mill to the complainants, Seymour and Sage, for the term of two years, and on the twenty-eighth of the same month, he executed to them a mortgage upon the paper-mill to secure the payment of forty thousand dollars with interest.

On the second of November, 1857, a writ of attachment issued out of the supreme court, at the suit of Hiram A. Briggs and Russell Briggs, to the sheriff of the county of Mercer, against the real and personal estate of James Gaunt and James T. Derrickson as non-resident debtors, by virtue of which the sheriff attached, inventoried, and appraised the paper-mill alone. The lot on Front street was not included in the inventory.

On the eleventh of November, 1857, a writ of attachment issued out of the supreme court to the sheriff of the county of Mercer at the suit of Henry M. Lewis, against the real and personal estate of James Gaunt, as a non-resident debtor, by virtue of which the sheriff attached, inventoried, and appraised both the paper-mill and the houses and lot on Front street. This latter attachment is still pending undisposed of.

In the attachment issued at the suit of Briggs against Gaunt and Derrickson, judgment was recovered, upon the report of auditors, in favor of divers creditors, to an amount exceeding eighty-five thousand dollars, including a claim of the complainants, Seymour and Sage, against Gaunt alone, to the amount of fifty thousand nine hundred and sixty-five dollars and seventy-five cents, and the auditors were directed to make sale of the property attached. At a sale made by the auditors on the twenty-ninth day of July, 1859, Seymour, one of the complainants, for the benefit of the firm, became the purchaser of

the paper-mill, with the privilege of diverting the water from the spring to the paper-mill, and also of the houses and lot on Front street. The property was conveyed to him accordingly, by deed dated on the ninth of September, 1859. The complainants, by virtue of their lease and of the title thus acquired by them, continued in possession and enjoyment of the paper-mill and of the spring of water down to the time of filing their bill.

Lewis claims title to the lot on Front street, and also to the spring of water, with the right of diverting it from the complainants' mill by virtue of a deed from Griffen Green, bearing date on the fifth of May, 1859.

The bill prays that the deed from Gaunt to Griffen Green, and from Green to Lewis, may be declared to be fraudulent and void, or that they shall stand as securities for the sums actually advanced to Gaunt as a consideration for the conveyance; that Lewis may be enjoined from using the title as a defense to an ejectment brought by Seymour for the recovery of the said lot, and that he may be also restrained from diverting or obstructing the flow of water from the spring to the complainants' mill.

Upon the facts disclosed by the pleadings, and established by the evidence in this cause, the complainants have an unquestioned title to the paper-mill, with the appurtenances. The defendant has the legal title to the lot in Front street. Assuming the title from Gaunt to Griffen Green, under which the defendant claims, to be valid and operative, the material question in the cause is, whether the right to water flowing from the spring passed with the title of the lot upon which the spring is situate, or whether it remained in the grantor as an appurtenance of the mill. The water of the spring was diverted from its natural channel, and was conveyed to the mill, to be used in the manufacture of paper by a former proprietor of both lots, at least as early as the year 1845. The water was carried from the spring to the mill, a distance of eight or nine hundred feet, by means of iron pipes or conduits laid under ground. The diversion of the water was effected by the proprietor, at a great expense, for the exclusive benefit of the mill. It continued to be so used and enjoyed by the successive proprietors of the two lots for several years, and so long as the title of the two lots were united in the same person. It was so used and enjoyed by James Gaunt at the date of the conveyance of the Front-street lot to Griffen Green, on the thirty-first of August, 1857. The deed is in the usual form of

a deed of bargain and sale, and contains no express reference to the spring, or the water flowing from it, either by way of grant or reservation. The complainant insists that the grantee took title to the Front-street lot, upon which the spring is situated, subject to the easement of the flow of water to the mill, as it was used and enjoyed by the owner at the date of the conveyance.

In an elementary treatise of deservedly high reputation, it is said that the implication of the grant of an easement may arise upon a severance of a heritage by its owner into two or more parts. Upon the severance of a heritage, a grant will be implied: 1. Of all those continuous and apparent easements which have in fact been used by the owner during the unity, though they have had no legal existence as easements; and 2. Of all those easements without which the enjoyment of the several portions could not be fully had: Gale & Whately on Easements, 49.

The rule of the French law upon this subject, with the incidents of which the common law is said to agree, is thus laid down in the French civil code: "If the proprietor of two estates, between which there exists an apparent sign of servitude, disposes of one of these estates without inserting in the contract any stipulation relative to the servitude, it continues to exist actively or passively in favor of the land alienated or over the land alienated: Code Napoleon, b. 2, tit. 4, sec. 694.

Does this principle prevail at common law?

In the very recent case of *Lampman v. Mills*, 21 N. Y. 507, Justice Selden, in delivering the opinion of the court of appeals of New York, said: "The rule of the common law on this subject is well settled. The principle is, that where the owner of two tenements sells one of them, or the owner of an entire estate sells a portion, the purchaser takes the tenement or portion sold with all the benefits and burdens which appear at the time of the sale to belong to it, as between it and the property which the vendor retains. This is one of the recognized modes in which an easement or servitude is created. No easement exists so long as there is a unity of ownership, because the owner of the whole may at any time rearrange the qualities of the several parts. But the moment a severance occurs by the sale of a part, the right of the owner to redistribute the properties of the respective portions ceases, and easements or servitudes are created corresponding to the benefits and burdens mutually existing at the time of the sale."

The principle thus clearly stated is fully sustained by the current of authority, both ancient and modern: *Robbins v. Barnes*, Hob. 131; *Nicholas v. Chamberlain*, Cro. Jac. 121; *Cox v. Matthews*, 1 Vent. 237; *Palmer v. Fletcher*, 1 Lev. 122; S. C., 2 Sid. 167; *Shury v. Piggot*, 3 Bulst. 339; *Brakely v. Sharp*, 10 N. J. Eq. 206; *Hazard v. Robinson*, 3 Mason, 272; *United States v. Appleton*, 1 Sumn. 492; *New Ipswich Factory v. Batchelder*, 3 N. H. 190 [14 Am. Dec. 346]; *Kilgour v. Ashcom*, 5 Har. & J. 82.

It is admitted that this doctrine applies in its fullest extent in support of all easements claimed by the grantee of that part of the premises first sold by the common owner. Thus it is said, if Gaunt had retained the lot upon which the spring is, and conveyed the mill, the right to use the water would have passed by the conveyance as appurtenant to the mill; but having retained the mill, and conveyed the lot upon which the spring is, the spring passes by the grant, and the grantor, or those claiming under him, cannot claim the easement of having the water for the use of the mill, for that would be a derogation of the grant. There is no doubt that several of the reported cases are made to rest upon this ground, and the principle may be safely invoked against the grantor in support of the broader right arising from the actual condition of the premises at the time of the severance of the ownership. But there are cases which do not rest upon this principle, nor can it be invoked in their support.

Thus in regard to what are termed easements of necessity, as where a man grants land in the middle of his field, the easement of a right of way across the grantor's land is said to flow by necessity from the grant. But if the grantor conveys the surrounding land, reserving to himself the center of the field, he has the easement of a right of way across the land of the grantee: 2 Bouv. Inst. 190.

So where land held in unity is partitioned, either by the voluntary consent of the parties or by judicial proceeding, the owner of each share will take his part subject to all the burdens which were imposed and all the advantages conferred by the prior owner. In *Kilgour v. Ashcom*, 5 Har. & J. 82, the action was brought for overflowing the plaintiff's land by a milldam in the occupancy of the defendant. The land of both parties had previously belonged to one John Keech, who died intestate, and the land was partitioned by the authority of the orphans' court among his heirs. The parties, plaintiff

and defendant, held, respectively, the shares of the children. Upon the defendant's share was a mill, the dam of which threw the water upon the plaintiff's land. A small part of the dam was also upon his land. The court say the mill and the dam were, at the time of bringing the suit, in the same situation in which they had been left by John Keech, and had been held by him in his life-time, and the question is, whether Samuel Keech, and those claiming under him, have a right to use them in the same way and to the same extent; and it is clear that they have. The children of John Keech took their respective proportions of their father's estate in the same condition and subject to the same advantages and disadvantages under which he held it.

In *Brakely v. Sharp*, 9 N. J. Eq. 1, S. C., 10 N. J. Eq. 206, the same principle was maintained by the chancellor, after a very full discussion and elaborate examination of the authorities. In that case, the owner of a farm, upon which there was a spring of water, conveyed the water from the spring to two dwelling-houses upon the premises. The owner died intestate. That part of the land upon which were the spring and one of the dwellings was assigned, by order of the orphans' court, to the widow and one of the heirs. The part of the farm on which the other dwelling was, was sold by the commissioners under the order of the orphans' court, and came, by sundry mesne conveyances, to the complainant. The bill was filed to protect him in the enjoyment of the water flowing through the pipe to his dwelling. It was held by the chancellor that the aqueduct and the right to use the water, as it was held and enjoyed by the former owner, being essential to the beneficial enjoyment of the premises, vested in the complainant, and a perpetual injunction was granted to protect him in the enjoyment.

These cases show clearly that an easement may be created by the disposition made by the owner of an estate, and that, upon the severance of title, the owners will take their respective shares as they existed in the hands of the former owner. It was held, however, in the latter case, though the opinion was not essential to the decision of the cause, that if the owner himself had severed the unity of title, he could not claim the easement upon the land on the ground that it would be derogating from his own grant.

In *Nicholas v. Chamberlain*, Cro. Jac. 121, which is one of the earliest cases on the subject, it was held by all the court

that if one erect a house, and build a conduit thereto in another part of his land, and convey water by pipes to the house, and afterward sell the house with the appurtenances, excepting the land, or sell the land to another, reserving to himself the house, the conduits and pipes pass with the house, because it is necessary and *quasi* appendant; and he shall have liberty by law to dig in the land for amending the pipes, or making them new, as the case may require.

The question in this case came up upon demurrer, and it does not appear whether the house or the vacant land had been conveyed. But the court treat that as a matter of perfect indifference. In either event, the conduit and pipes go with the house. This case has never been overruled, but has often been cited with approbation: *Hazard v. Robinson*, 3 Mason, 279; *United States v. Appleton*, 1 Sumn. 502; *Lampman v. Milks*, 21 N. Y. 508; *New Ipswich Factory v. Batchelder*, 3 N. H. 190 [14 Am. Dec. 346].

In the last case, the chief justice, in delivering the opinion of the court, after citing the case of *Nicholas v. Chamberlain*, Cro. Jac. 121, says: "The rule here laid down seems to us to be founded in sound reason and good sense."

In *Palmer v. Fletcher*, 1 Lev. 122, the case was, a man erected a house on his own lands, and afterwards sold the house to one, and the lands adjoining to another, who obstructed the lights of the house. It was held that neither the builder nor any purchaser under him could obstruct the lights, on the ground that the grantor could not derogate from his grant. Kelynge, J., said, if the vacant ground had been sold first, and the house afterwards, the purchaser of the ground might then have stopped the lights. Twisden, J., to the contrary, said, whether the land be sold first or afterwards, the vendee of the land cannot stop the lights of the house in the hands of the vendee or his assignees. The rule, as declared by Twisden, is now the well-settled rule of the English law: *Riviere v. Bower*, 1 Ry. & M. 24.

In the recent case of *Lampman v. Milks*, 21 N. Y. 507, already referred to, the court say: "This is not a rule for the benefit of purchasers only, but is entirely reciprocal. Hence if, instead of a benefit conferred, a burden has been imposed upon the portion sold, the purchaser, provided the marks of the burden are open and visible, takes the property with the servitude upon it. The parties are presumed to contract in reference to the condition of the property at the time of the

sale, and neither has a right, by altering arrangements then openly existing, to change materially the relative value of the existing parts."

The subject is carefully considered in the elementary treatise already referred to, and the rule, the ground upon which it rests, and the limitations to which it is subject, are thus stated: "To clothe with right this permanent alteration of the qualities of two heritages, the consent of the owner of the servient tenement, in the manner appointed by law, is necessary; but where the land benefited and the land burdened belong to the same owner, he may change the qualities of its several parts at his will, and his express volition, evidenced by his acts, must at least be as effectual to impress a new quality upon his inheritance as the implied consent arising from his long-continued acquiescence. . . . It is true that, strictly speaking, a man cannot subject one part of his property to another by an easement, for no man can have an easement in his own property, but he obtains the same object by another right, the general right of property; but he has not the less thereby permanently altered the quality of the two parts of his heritage, and if, after the annexation of peculiar qualities, he alien one part of his heritage, it seems but reasonable, if the alterations thus made are palpable and manifest, that a purchaser should take the land burdened or benefited, as the case may be, by the qualities which the previous owner had undoubtedly the right to attach to it. . . . The reasoning applies to those easements only which are attended by some alteration which is in its nature obvious and permanent, or, in technical language, to those easements only which are apparent and continuous, understanding by apparent signs, not those which must necessarily be seen, but those which may be seen or known on a careful inspection by a person ordinarily conversant with the subject:" Gale & Whatley on Easements, 51, 53.

Every grant of a thing, says Mr. Justice Story, naturally and necessarily imports a grant of it as it actually exists, unless the contrary is provided for: *United States v. Appleton*, 1 Sumn. 502.

At the time of the grant of the Front-street lot from Gaunt to Griffen Green, the stream was diverted from its natural course through the land granted by an artificial channel to the mill of the grantor. The grantee took the land as it then stood, with the water diverted from it. *Lampman v. Mills*, 21 N. Y. 507, is an express authority that the grantor

could not return the water to its natural channel against the consent of the grantee. The grantee has a right to insist that it shall be continued as it was at the date of the grant, viz., in the artificial channel. He cannot have a right to elect in which channel it shall go. If the grantee have a right to insist upon its being continued in the artificial channel, the grantor must have an equal right to keep it there.

The easement in question, being apparent and continuous in its character, comes within the operation of the principle. The water flows naturally and continuously from the spring to the mill, the fall between the two points being about one foot. Owing to the length of the pipe, and the consequent obstruction to the flow of the water, it was found that the full benefit of the spring was not obtained. The owner, therefore, to overcome the difficulty, applied the pump, driven by machinery, directly to the pipe, and thus obtained the full advantage of the supply of water. It has thus been used nearly from the time that the pipes were first introduced.

Nor is the right of the parties at all affected by the grant of the right of diverting the water made by Gaunt to Griffen Green. It is somewhat difficult to discover the purpose of that conveyance. Viewed in regard to its apparent object, it is manifestly inoperative. In 1825, Harding, who owned the mill and the lot on Front street, upon which the spring is, purchased of the owner of the land lying between the spring and the Assanpink creek, an additional lot, lying between the spring and Washington street, together with the perpetual right of diverting to the paper-mill of the grantee or elsewhere all waters rising or flowing over or from the land granted, so that it should not flow over the land of the grantor in its usual and accustomed course to the Assanpink creek. Harding acquired thereby the title to the land, and the easement of diverting the water from its usual and accustomed channel across the land of the grantor to the Assanpink creek. Easements are not rights distinct from the title of the land. They are imposed upon corporeal property for the benefit of corporeal property. To constitute an easement, there must be two distinct tenements, the dominant, to which the right belongs, and the servient, upon which the obligation is imposed: *Gale & Whatley on Easements*, 5; 2 *Bouv. Inst.* 170.

By virtue of the conveyance to Harding, the spring lot became the dominant tenement, and acquired the easement of

diverting the water from its accustomed channel to the Assanpink over the land of the grantor, which was subjected to the charge of losing the flow of the water. It passed with the title of the land itself. It could not exist separate from it. It was not annexed to the person of the owner. The title to the land could not be in one person, and the easement or right of diversion in another. When, therefore, the Front-street lot was granted by Gaunt to Griffen Green, the easement, or right to divert the water from its course over the adjacent lot to the Assanpink creek, passed with it. Now, that is the easement which in terms this deed professes to grant, viz., the right of diverting the water so that it shall not flow over the intervening land into the Assanpink. For that purpose, as has been said, the grant is inoperative, because the easement had already passed by the grant of the land.

But it was suggested, upon the argument, that the effect of the grant was to authorize the diversion of the water from the paper-mill. Such clearly is not the legal effect of the instrument. In very terms, it authorizes the water to be diverted to the paper-mill or elsewhere, as against the claims of the servient tenement, but not as against any other adverse right. The deed, I think, never could have been construed, as against Gaunt himself, into a grant of a right appurtenant to the paper-mill, and destructive of the value of that property.

But, however this may be as against the mortgagee and attaching creditors of the mill property, it is clearly inoperative.

The clear weight of the evidence is, that the deed was neither executed nor delivered at the time it bears date, nor until the twenty-third day of January, 1858, the day upon which it was acknowledged. It was not recorded until the seventh of April, 1859. It could, therefore, affect no right of the mortgagee or attaching creditor, which were acquired long before. Viewed as a grant of a right to divert the water from the paper-mill, it was clearly a conveyance of property, which must have been recorded to give it priority over the rights of the attaching creditors.

The complainant further insists that the deed from Gaunt to Griffen Green, under which Lewis claims title, is fraudulent and void as against creditors, and that he has acquired a valid title to the premises under the attachment by virtue of the auditor's deed.

The writ of attachment, under which the complainants claim title, was not executed upon the Front-street lot. That lot was

not specified in the inventory and appraisement. No lien was acquired thereon by virtue of the writ, and the auditor's deed was inoperative to give title.

The evidence in the cause tends strongly to prove that the conveyance of the Front-street lot from Gaunt to Green was not a *bona fide* sale, but was either fraudulent or intended as a collateral security for accommodation paper previously furnished by the grantee to the grantor. The answer of Lewis states that the nominal consideration of the deed, five thousand dollars, was paid as follows: One thousand six hundred and sixty-six dollars in cash, and the balance of two thousand three hundred and thirty-four dollars in two promissory notes at six months, one for one thousand six hundred and sixty-six dollars, and the other for one thousand six hundred and sixty-eight dollars. The whole transaction, upon its very face, is in the highest degree unnatural and improbable. The grantor aliens the land and puts the purchaser in possession, taking in payment for two thirds of the consideration-money the promissory notes of the vendee, who is shown to be totally irresponsible, and who in fact never advanced one dollar on account of them. The amount of the notes was raised by a sale of the lot after Gaunt's death.

One of the notes is dated on the thirteenth of July, the other on the eighteenth of August, and both are payable six months after date. The deed is dated and executed on the thirty-first of August. They wear all the appearance of being mere accommodation paper. Green, the maker, declared that they were so, and that he never received any consideration for them. The account given of the payment of the balance of the purchase-money is far from being satisfactory. It rests entirely upon the testimony of Green himself, who was a deeply interested witness, and is uncorroborated by a single circumstance. The answer of Lewis upon this point is of no value, for it is stated to be, as it obviously was, upon information merely. If to these circumstances be added the alleged grant of the right to divert the water from the mill and the lease of the water for two years from Green to Gaunt, for the use of the mill, the character of the transaction stands out in strong colors. The grantor, on the eve of insolvency, conveyed to his father-in-law two houses and a lot, which are proved to be worth five thousand dollars, and which were paying an annual rent of three hundred dollars, together with the right to divert from a large and valuable paper-mill a stream of water which was essential

to its successful operation, and the lowest estimated value of which to the mill-owner was five thousand dollars, for the nominal consideration of five thousand dollars, and receives in return one thousand six hundred and sixty-six dollars in cash, and two promissory notes of the vendee, who was totally irresponsible, for two thousand three hundred and thirty-four dollars, which were never paid by the grantee. It is hazarding little to assert that no such transaction ever was or could have been made in good faith.

As between the creditors of Gaunt, the grantor, and the grantee, the conveyance must have been set aside as fraudulent, or treated as a mere security for the amount actually advanced by the purchaser. But Lewis, the present defendant, stands upon different ground. He paid a full and fair consideration for the premises, independent of the claim to the water right. There were certainly circumstances within his knowledge calculated to put him upon inquiry as to the character of the title of his grantor. Lewis no doubt at one time regarded the deed to Griffen Green as fraudulent, and acted upon that belief. On the other hand, the attaching creditors did not levy their attachment upon the property in question, thereby treating the conveyance to Green as valid. These complainants treated the conveyance as valid. They sued out an attachment against Green, and caused it to be levied upon the lot in question, and were proceeding to sell it in payment of the notes alleged to have been given by him as part of the purchase-money. Under those circumstances, the lot being about to be sold under the attachment at the suit of these complainants as the property of Green, Lewis purchased for a fair price, and paid more than two thirds of the purchase-money to the complainants themselves, in discharge of their claim against Griffen Green. Under such circumstances, the complainants do not stand in a position in a court of equity, either in their own right as creditors of Gaunt, or under color of the right of other creditors, to contest the validity of Lewis's title.

The objection to the bill on the ground of multifariousness is not sustained. The sole design of the bill was to draw in question the validity and effect of the complainant's title to the Front-street property. The whole ground of controversy is with one defendant, virtually by the same plaintiff, and respecting one subject-matter. The objection is not raised, either by the answer or by demurrer. There is nothing in the

case to create embarrassment or perplexity in settling the rights of the parties.

The prayer of the complainant's bill, so far as it seeks to set aside the title of Lewis to the Front-street lot, must be denied. The injunction restraining him from offering the title in evidence as a defense to the complainant's action at law must be dissolved. The injunction restraining him from diverting the water of the spring upon said lot from the complainant's paper-mill, and from interfering with the flow thereof, as heretofore used, must be made perpetual. The decree will be made without costs against either party.

CREATION OF EASEMENT UPON ONE OF TWO TRACTS BY OWNER OF BOTH. This subject is treated in the note to *Elliott v. Rhett*, 57 Am. Dec. 759-768. *Lampman v. Mills*, 21 N. Y. 505, of which a portion of the opinion by Selden, J., is cited in the principal case, was an action for changing the course of a stream and flooding the plaintiff's land. The plaintiff's land originally formed a portion of a forty-acre tract, through which ran a small brook that emptied into a creek adjoining the tract. The natural course of the brook was through the entire length and across the south line of the portion of the tract afterwards conveyed to the plaintiff, and it spread over and flooded about half an acre of this portion of the tract. Sometime before the conveyance to the plaintiff, the owner of the land turned the brook through an artificial channel across the north line of the portion mentioned, and upon other portions of the forty acres, and thence into the creek, thus leaving the half acre in the southern part of the portion, afterwards conveyed to the plaintiff, dry and free from overflow, and upon this part the plaintiff built his house and barn; the brook was running through the artificial channel when the owner conveyed to the plaintiff, and had been for some time previously. How long, was not clearly shown. The court says, however, upon this point: "It did not distinctly appear how long the stream had run in this artificial channel prior to the conveyance of the lot by Chesebro, nor do I deem this of any importance. It was several months at least." The plaintiff's grantor afterwards conveyed the residue of the forty acres to the grantor of the defendant. And the defendant dammed up the entrance to the artificial channel, which caused the brook to flow in its original bed and to overflow the plaintiff's yard, and this was the injury complained of. Judgment was ordered for the defendant. This was affirmed in the supreme court. The plaintiff then appealed to the court of appeals, which reversed the judgment and ordered a new trial. The two extracts from the opinion contained in the principal case show the law as expounded by Selden, J. In the conclusion of the opinion, the distinction is noted that the rule concerning the passing of easements upon the severance of one of two tenements by the owner of both, though general in its application to easements that are continuous, that is, those of which the enjoyment is or may be continual without the necessity of human intervention, such as the flow of a stream or the right to light or air, is restricted in the case of discontinuous easements, such as rights of way, to such as are absolutely necessary to the enjoyment of the property conveyed. Upon this point, see also *McTavish v. Carroll*, 61 Am. Dec. 353, note 384; *Elliott v. Rhett*, 57 Id. 750. What easements pass as incident to the land conveyed: *Morgan v. Mason*, 55

Id. 464, note 472; *Hammond v. Woodman*, 66 Id. 219; *Taber v. Bradley*, 72 Id. 498, note 502. The purchaser of land subject to the burden of a continuous and apparent easement, takes it subject to the burden of that easement, and will be restrained from doing any acts which will interfere with the benefit and enjoyment to the full extent to which the party having a right thereto, who has not parted with nor impaired the same, was entitled at the time such purchaser bought: *De Lenc v. Bradbury*, 25 N. J. Eq. 84, citing the principal case. The distinction between easements which are apparent and continuous and those which are not, is that the former pass on the severance of the two tenements as appurtenant without the use of the word "appurtenances," but the latter do not pass unless the grantor uses language in the conveyance sufficient to create the easement *de novo*: *Fetters v. Humphreys*, 19 Id. 476; *Goodell v. Godfrey*, 53 Vt. 225; *Kutz v. McCune*, 22 Wis. 630, citing the principal case. See upon this point, note to *Elliott v. Rhett*, 57 Am. Dec. 761.

EASEMENT, WHAT IS: *Haskell v. Putnam*, 54 Am. Dec. 158; *Ritger v. Parker*, Id. 744, and notes.

CASES
IN THE
COURT OF APPEALS
OF
NEW YORK.

OGDEN v. PETERS.

[21 NEW YORK, 22.]

PROVISION DIRECTING ASSIGNEE TO CONVERT ASSIGNED PROPERTY "INTO CASH as soon as the same may conveniently and properly be done," does not render void an assignment for the benefit of creditors. Such a provision is supererogatory and harmless.

SOLVENCY OF DEBTOR, EITHER IN HIS OWN ESTIMATION OR IN FACT, DOES NOT INVALIDATE HIS ASSIGNMENT of his property for the payment of his debts.

INTENTION OF DEBTOR TO HINDER OR DELAY CREDITORS RENDERS ASSIGNMENT FRAUDULENT and void, but that intention cannot be inferred from the solvency of the assignor any more than from his insolvency.

ACTION to set aside an assignment. The judge who tried the cause without a jury found the following facts: The defendant Peters, being in fact insolvent, but supposing his property to be sufficient to pay his debts, made an assignment of all his property and choses in action to the defendants, Doughty and Brock, in trust to sell the same and convert the whole thereof into cash, and apply the proceeds to the payment of his debts, according to a declared order of preference. The judge found the assignment to be valid, and rendered judgment dismissing the complaint. This judgment was affirmed at general term in the second district, and the plaintiff appealed. Other facts are stated in the opinion.

Gilbert Dean, for the appellant.

John K. Porter, for the respondent.

By Court, COMSTOCK, C. J. The assignment is not void for the reason merely that it contains a provision directing the assignee to convert the property "into cash as soon as the same may conveniently and properly be done." The rule undoubtedly is, that an insolvent debtor cannot create a trust of this nature, and impose upon the trustee any restrictions inconsistent with the right of creditors to have the assigned property converted immediately into money for the payment of their demands. An assignment drawn precisely as it ought to be will not undertake to speak to the assignee in regard to his duties under the trust. Those duties, unless the creditors themselves direct otherwise, are simply to convert the estate and pay the debts in the order and with the preferences indicated in the instrument. A trustee is always bound by any restrictions contained in the writing which creates the trust, and if these are inconsistent with the rights of creditors, the trust itself must fall to the ground. The law does not, in general, control a trustee in opposition to the will of the author of the trust as declared in the writing by which it is constituted; but the law can and does overthrow all schemes by which creditors are hindered, delayed, or defrauded. In this particular case, we think the direction to the assignee was harmless, although it was entirely supererogatory. We consider it harmless because it has no definite meaning at all. The language may be criticised, but it cannot fairly be construed as conferring any power or direction outside of the simple and plain duty of the assignee to go on at once, convert the estate, and pay the debts.

It was found at the trial as a conclusion of fact, that the assignor, when he made the assignment, supposed that his property was sufficient to pay his debts; and on this ground it is said that the law condemns the transaction. As assignments for the benefit of creditors are generally made by insolvent debtors, it is not unfrequently urged that such dispositions of property can be made only by that class of persons. But this doctrine has no foundation in principle or authority. These assignments are in their nature simply trusts for the payment of debts. The power to create such trusts is certainly not peculiar to insolvent men. On the contrary, it is a power more unquestionably possessed by men who are entirely solvent. In England, insolvent assignments fall under the condemnation of the bankrupt system. But there, as well as here, persons of undoubted ability to pay their debts can dispose of their prop-

erty as they please, so far as the question of power merely is concerned. This right of disposition, on general principles of law and justice, was never doubtful except in case of a debtor's inability to meet his engagements. In that condition, the claims of creditors are in justice paramount, and the debtor's power to dispose of his estate, even for their benefit, was not established without a struggle. In short, it was the insolvency, rather than the solvency of a debtor, which suggested the doubt in regard to the right of putting the whole or any part of his property in trust for the benefit of creditors. It is undoubtedly true that a solvent as well as an insolvent person may make a fraudulent assignment. In either condition, the question is one of fact, depending mainly on other circumstances, where the instrument is on its face free from obnoxious provisions.

It has been urged that a debtor having, as he believes, an estate more than sufficient to pay all his debts, but, nevertheless, embarrassed by their immediate pressure, and fearing a sacrifice, has no right to withdraw his property from legal process, and delay his creditors by the interposition of a trust. This argument has the same force in the case of admitted insolvency. In either case, if the intention is to hinder or delay creditors, the transaction is fraudulent; but that intention cannot be inferred from one condition of the assignor any more than from the other. It is admitted that an insolvent may assign the whole or any part of his estate. It is a perfectly clear proposition that a person, not only solvent, but unembarrassed, may do the same thing. Is there, then, an intermediate condition between solvency entire and complete and total insolvency, where the right and power to create such a trust do not exist? According to plain rules of logic and law, I think there is not.

The authorities cited in support of the doctrine contended for do not sustain it. In *Ward v. Trotter*, 3 Mon. 1, the deed of trust declared that the debtor made the assignment "to prevent a sacrifice of his property, which he deemed ample for the payment of his debts." One of the objects of the trust, therefore, was to prevent a sacrifice, and this was illegal because the creditors, in their election, had a right to demand an immediate conversion, although at a loss to the debtor's estate. The assignment was therefore adjudged to be void. A similar doctrine was laid down in *Vernon v. Morton*, 8 Dana, 247, 263. These Kentucky cases were cited in *Van Nest v.*

Yoe, 1 Sandf. Ch. 4. In that case, the illegality did not appear on the face of the instrument, but the answer admitted that the assignment was made with a view to have a solvent but embarrassed estate "turned to the best account." This was understood to be a confession that the motive of the debtor was to procure an extension of time so as to save a larger surplus to himself. Some observations of the assistant vice-chancellor may go further than he was required to go by the precise facts before him. But the case itself is by no means an authority for saying that a solvent debtor may not make an honest and valid assignment.

It is claimed that the complaint in this case is so framed as to justify a decree that the assignee account for the estate which went into his hands, even assuming that the assignment is valid. This view of the case does not appear to have been urged at the trial, and there is in the record no exception which raises such a question.

We think the judgment must be affirmed.

All the judges concurred; SELDEN, J., excepting, however, to that portion of the opinion which, as he thought, implied that it might be indifferent, upon the question of actual intent to hinder and delay creditors, whether the debtor was solvent or insolvent. In the former case, there appeared a presumption that the motive of the assignor was to increase an anticipated surplus for himself.

Judgment affirmed.

DEBTOR KNOWING HIMSELF TO BE SOLVENT MAY MAKE ASSIGNMENT of his property for the benefit of his creditors, but he must make it in conformity with the statute: See *Knight v. Packer*, 72 Am. Dec. 388, note 392, where other cases are collected. The fact that an assignment is made by an embarrassed debtor, whether solvent or insolvent, to prevent a sacrifice of his property, will not of itself necessarily render the assignment void: *Angell v. Rosenbury*, 12 Mich. 264, citing the principal case.

INTENT TO HINDER AND DELAY CREDITORS BY ASSIGNMENT FOR BENEFIT OF CREDITORS renders it fraudulent and void: *Knight v. Packer*, 72 Am. Dec. 388, note 392.

ASSIGNMENT FOR BENEFIT OF CREDITORS IMPOSING UNREASONABLE LIMITATION ON POWERS OF TRUSTEE IS VOID: See *Inloes v. American Exchange Bank*, 69 Am. Dec. 190, note 195, where other cases are collected.

THE PRINCIPAL CASE IS CITED in the following cases to these points: No general assignment is adjudged fraudulent on its face where its language admits of an interpretation in harmony with settled principles of law: *Townsend v. Stearns*, 32 N. Y. 215. An assignment valid on its face is not rendered invalid by any subsequent failure of the assignee to perform his duty:

Juliand v. Rathbone, 39 Barb. 100. Placing a mortgagee among preferred creditors as to his bond and mortgage is not to be considered as an absolute direction that the mortgage debt shall be paid out of other assigned property, but as a direction to pay the bond and mortgage out of the whole of the assigned property, subject to the control of the court over the assignee as trustee, and subject to the usual and well-recognised rules of equity in the application of the assigned property to the payment of the debts, as between the creditors: *Dimon v. Delmonico*, 35 Id. 562.

OLCOTT v. ROBINSON.

[21 NEW YORK, 150.]

PUBLICATION OF COPY OF NOTICE OF SALE OF REAL ESTATE UPON EXECUTION IS SUFFICIENT, if it be published in six successive numbers of a weekly newspaper, although the first publication be less than six weeks prior to the sale, provided the original notice has been posted, as required by the statute, forty-two days previous to the sale.

EJECTMENT. On the trial, the plaintiff made title under a sale upon execution made on the eighth day of March, 1850, and the question was, whether or not sufficient publication had been made of the sheriff's notice of the time and place of making such sale. The sheriff caused a copy of said notice to be printed in a newspaper of the county once in each week for six weeks successively. The newspaper was printed only on Saturday of each week, and its first publication was on the thirtieth day of March, and the last on the fourth of May. There was a verdict and judgment for the plaintiff. This judgment was, on appeal, reversed at general term in the fourth district. The plaintiff appealed from the latter judgment, stipulating that if the order appealed from should be affirmed, judgment absolute should be entered against him. Other facts are stated in the opinion.

Gardner Stow, for the appellant.

Alonzo C. Paige, for the respondent

By Court, DAVIES, J. The revised statutes require (2 R. S. 368, sec. 36) that the time and place of holding any sale of real estate, pursuant to any execution, shall be publicly advertised previously for six weeks successively, as follows: 1. A written or printed notice thereof shall be fastened up in three public places in the town where such real estate shall be sold; 2. A copy of such notice shall be printed once in each week, in a newspaper of such county, if there be one. It is conceded

that the formalities required by the first subdivision of this section have been complied with, and that the time and place of the sale, so far as prescribed by it, had been advertised for six weeks successively previous to the day of sale. The notice was fastened up on Tuesday, the twenty-sixth of March, and continued so fastened up until the day of sale, Wednesday, May 8th. It was, therefore, so far as the notice fastened up was concerned, publicly advertised for six weeks successively, previous to the sale.

The second subdivision, it will be observed, requires a publication in the newspaper, of a copy of the notice posted up; clearly, therefore, implying that the posting or fastening up is to precede the publication. It is a copy of the notice fastened up, which is to be printed once in each week in a newspaper of the county for six weeks previous to the sale.

There is no doubt that all the formalities of the first subdivision were strictly complied with, and the notice thus posted up was the original notice of sale. It is thus expressly declared by statute. It was put up at the right time, and continued up for the right time. No law required it to be put up sooner. A copy of the notice thus fastened up is to be printed in a newspaper for six weeks, once in each week. Can it with truth be said that the statute requires the copy to be printed before the original is in existence? It is a perversion of terms to say so. The original is first to be fastened up, and to be put up for the time prior to the sale required by statute, then the copy is to be printed in the newspaper. It is not correct to say that the copy of a notice, the original of which had no existence until Tuesday, March 26th, should have been published in the newspaper of Saturday, March 23d. The copy could not be prepared for publication until the original had existence, and then it was printed in the first publication thereafter, and printed once in each week for the six weeks successively intervening between the fastening up of the original notice and the day of sale. It seems to me that this is not only a strict compliance with the spirit of the provisions of the statute, but with its letter also.

The defendant relies on the authority of an anonymous case: *Anonymous*, 1 Wend. 90. This seems to have been submitted to the judges of the supreme court by a commissioner for their advice, and decided without argument. The provision of the revised laws, to which the case referred, was that an insolvent seeking a discharge should cause an advertisement

to be published for six weeks successively, specifying the time and place for his creditors to show cause why an assignment should not be made by the insolvent and he be discharged. It was stated to the judges of the supreme court in that case that it did not appear that full six weeks' notice to the creditors had been given. The affidavit of publication set forth that the advertisement or notice had been regularly published in the newspaper directed once in each week, for six weeks successively, commencing on a certain day. Woodworth, J., said the proof of publication was undoubtedly defective. The affidavit might literally be true and yet only thirty days' notice be given. The statute requires the advertisement or notice to the creditors to show cause to be published for six weeks successively, that is, during forty-two days.

The authority of this case has been greatly impaired by the decision of the supreme court of the seventh district, in *Sheldon v. Wright*, 7 Barb. 39. In that case, the provision of the statute under consideration was that authorizing a surrogate to make an order directing all persons interested in the estate of a deceased person to show cause, on a day to be named in such order, why so much of the real estate whereof such testator or intestate died seised, should not be sold as would be sufficient to pay his debts; and the statute further provided that such order should immediately thereafter be published for four weeks successively, in two or more public newspapers printed in this state: 1 R. L. 450, sec. 23. The order in that case was made on the sixth of September, 1826, requiring the cause to be shown before the surrogate on the nineteenth of October following. The order was published in the Free Press, a newspaper printed in Auburn, Cayuga county, once in each week for four weeks successively, commencing on the twentieth day of September, 1826, and in the Cayuga Patriot, printed in the same place, once in each week for the same number of weeks, commencing on the twenty-seventh of September, 1826. Welles, J., in delivering the opinion of the court, says: "I have no doubt whatever that it is essential, in order to give the surrogate jurisdiction of the persons of the heirs, that this provision of the statute should be strictly complied with. It is the only process to bring them into court, and without it, they are without their day in court. And I think that notice for the full time required by the statute is equally indispensable; that short notice would be as no notice. . . . It is claimed that the notice so far as one of the papers was

concerned (the Cayuga Patriot) was not published four weeks. That the first publication, which was on the twenty-seventh day of September, was less than four weeks before the nineteenth day of October, when the parties were required to show cause, etc. This, as a matter of fact, will be seen upon a computation of time to be true. But I do not understand the act to require the first of the four successive publications to be four weeks before the day of showing cause. The requirement is satisfied by four successive weekly publications before the day."

And such, the learned justice says, has been the practical construction of the provision of the insolvent laws, requiring notice to creditors to be published, in one class of cases, six weeks, and in another, ten weeks. The case was brought up on an appeal to this court, and the judgment below affirmed: *Sheldon v. Wright*, 5 N. Y. 497. Foot, J., in delivering the opinion of this court, which was concurred in by five other judges, says that he has no doubt that the decision of the surrogate was correct, in respect to the time and manner of publishing the order to show cause. It was in accordance with the language of the statute, and there does not appear to be any reason for a different construction. And he refers to the decision of the supreme court of Massachusetts, in the case of *Bachelor v. Bachelor*, 1 Mass. 255, as directly in point, and says it appears to have been better considered, and to rest on sounder reason, than the adversary opinion of our own court in an anonymous case involving the same question: *Anonymous*, 1 Wend. 90. If the judgment of this court had turned upon this point in the case of *Sheldon v. Wright*, *supra*, it would have been an authoritative decision of the case now under consideration. The case of *Bachelor v. Bachelor*, *supra*, would seem to be a case nearly in point. The order directed the notice to be published in a newspaper for three weeks successively. The notice was inserted in a paper published twice weekly. It was first published in the paper issued Saturday, June 30th; secondly, Saturday, July 7th; and thirdly, Wednesday, July 11th. The court held that the order had been substantially complied with. They said it was usual, however, to publish with an interval of a week, but that it was not strictly necessary; the publication has been made in three successive weeks, which is sufficient. It would seem, therefore, that the weight of authority preponderates decidedly in favor of holding that the publication of the notice in the present case was suffi-

cient. The positions contended for by the learned counsel for the defendant in this case would lead to this result, that the posted notice should have notified the sale for May 13th, thus requiring a notice by fastening up to be a notice of forty-seven days, and the copy thereof printed in the paper on the thirtieth of March, sixth, thirteenth, twentieth, and twenty-seventh of April, and the fourth and eleventh of May, a published notice in the newspaper of forty-four days.

I do not think the statute is to be construed in a manner to lead to such results, but that its plain and literal import is to be followed. The notice is to be fastened up for six successive weeks previous to the sale, as was done in this case. A copy of the notice thus put up was to be published once a week for six successive weeks after such notice by posting had been given. This has also been done. It follows that the judgment of the general term should be reversed, and that of the special term be affirmed.

WRIGHT, J., also delivered an opinion for affirmance, and SELDEN, CLERKE, and WELLES, JJ., concurred.

COMSTOCK, C. J., filed a dissenting opinion.

DENIO and BACON, JJ., dissented.

Judgment reversed, and judgment for the plaintiff.

NOTICE OF SHERIFF'S SALE: See *Hinson v. Hinson*, 73 Am. Dec. 129, note 131, where other cases are collected. The publication of a notice of sale of real estate on execution in six successive numbers of a weekly newspaper is a sufficient publication for six weeks, although the first publication be less than six weeks prior to the sale; provided said notice was posted, as required by the statute, forty-two days previous to the sale: *Steinle v. Bell*, 12 Abb. Pr., N. S., 177; *Wood v. Moorhouse*, 1 Lans. 412; *Wood v. Terry*, 4 Id. 85; *Hackley v. Draper*, 4 Thomp. & C. 622; *Wood v. Morehouse*, 45 N. Y. 375, all citing the principal case. The principal case is disapproved on this point in *Meredith v. Chancey*, 59 Ind. 468. A publication once in each week for two weeks successively means that there shall be two publications, one in one week and the other in the next week, and not that two weeks must intervene between the first publication and the day designated for the hearing: *Merritt v. Village of Portchester*, 8 Hun, 45. The publication of a notice of a sale to take place on the twenty-eighth day of December, if made on the ninth and twelfth, sixteenth and nineteenth, twenty-third and twenty-sixth of December, is a publication "for three weeks immediately previous to the time of sale, at least twice in each week:" *Chamberlain v. Dempsey*, 13 Abb. Pr. 422; S. C., 22 How. Pr. 357; *Savings & L. Society v. Thompson*, 32 Cal. 352; *State v. Yellow Jacket S. M. Co.*, 5 Nev. 423, all citing the principal case.

THE PRINCIPAL CASE IS DISTINGUISHED in *People v. Trustees*, 70 N. Y. 32.

BARTLETT v. JUDD.

[21 NEW YORK, 200.]

EJECTMENT IN SHERIFF'S DEED OF LAND CONVEYED BY ONE PERSON TO ANOTHER covers land conveyed to the latter by the former's grantee.

SHERIFF'S DEED MAY BE REFORMED TO ACCORD WITH FACTS, where admissible evidence shows that its recitals are wrong and should be corrected.

PAROL EVIDENCE IS ADMISSIBLE TO SHOW THAT SHERIFF EXPRESSLY EXCEPTED CERTAIN LAND from the sale of a larger tract made by him under execution, in an action of ejectment brought by the purchaser at such sale.

STATUTE OF LIMITATIONS DOES NOT BEGIN TO RUN AGAINST DEFENDANT IN EJECTMENT in possession of land excepted out of a sale by the sheriff under execution, so as to bar such defendant's right to the relief of having the sheriff's deed reformed so as to show that such land had been so excepted, until the suit is commenced.

EJECTMENT to recover two and a half acres of land in possession of the defendant who derived title through several mesne conveyances from Daniel Tuttle. In January, 1835, the plaintiff recovered a judgment against Tuttle. In 1836, Tuttle purchased a tract of one hundred and forty-one acres of land, portions of which he afterwards conveyed to Sheldon Brewster, Norman Perry, John B. Church, and John Moore. The deed to Moore conveyed about sixty-three acres, and the premises in question were included in that conveyance. In August, 1837, Moore conveyed his sixty-three acres to William Smith, who was in possession of this land in August, 1839. Upon an execution issued on the plaintiff's judgment, the sheriff advertised the real estate of Tuttle, and on the thirteenth of August, 1839, he offered for sale the interest of Tuttle in the original tract, with certain reservations which in the certificate were described as follows: "Excepting and reserving therefrom the lands conveyed by Daniel Tuttle to Sheldon Brewster, Norman Perry, John B. Church, and William Smith." The plaintiff became the purchaser at the sale, and in 1840 obtained the sheriff's deed for the premises in which the lands were described and the reservations were expressed in the same words as those used in the certificate. On the trial before the referee, it was proved by testimony objected to by the plaintiff, that, at the sale, the sheriff did not offer the sixty-three acres held by Smith, but publicly declared that the same were not embraced in the lands sold. The exception in the certificate was intended to exclude them. From the facts found, the referee held, as a conclusion of law, that the plaintiff acquired no title to the premises in question by reason of their having been

excepted from the lands conveyed, and that the exception in the certificate and deed should be read as if the words "by Daniel Tuttle" were left out. The referee did not expressly find that the deed should be reformed as the defendant had demanded, by way of affirmative relief; but on appeal by the plaintiff, the court at general term gave the defendant leave so to modify the judgment as to direct the reformation, and it was accordingly done. The plaintiff appealed.

Albert P. Lanning, for the appellant.

E. Peshine Smith, for the respondent.

By Court, BACON, J. 1. I am by no means clear that as the deed stands, and without any change in its terms, the sixty-three acres within the boundaries of which the parcel now in question is contained is not excepted. There was no doubt that the land conveyed to Smith, and then actually held by him, was intended to be excepted. The only obscurity, if any there is, arises from the recital that it was conveyed to him by Tuttle, whereas in point of fact it was conveyed by Tuttle to Moore, and from him to Smith. Moore was simply the conduit through which it passed, an intermediate link in the chain which connected the two by only a single remove. In a legal, if not, perhaps, in a strictly popular sense, it may be said the premises are conveyed by Tuttle to Smith through Moore. The deed by Tuttle to Moore was to him, his heirs, and assigns. The covenants of the grantor would inure to the benefit of and include Smith, the subsequent grantee of Moore. There is both privity of estate and of contract between Tuttle and Smith, the covenants running with and being attached to the land. It is said that "where a party covenants in a deed for himself, his executors, and assigns, the word 'assigns' embraces any person to whom the property or interest described in the deed may happen at any future time to be assigned, either by deed or by operation of law." It seems to me, therefore, that it is putting no violence on the language of this deed to construe it as embracing the land conveyed in effect by Tuttle to Smith, although in point of fact, in its transmission, it happened to pass through another's hands.

2. The case made by the defendant was one manifestly calling for the reformation of the deed, if there is no valid legal objection to the reception of the evidence by which it was established. Although cases may be found in which such evidence has been held inadmissible where the question was one strictly

of legal cognizance, yet the doctrine that a deed, contract, or other instrument may in equity be reformed has been too long established to require authority to be cited to sustain it. In some of the cases, where, in an action of ejectment, proof of this character was rejected, it was nevertheless intimated that a remedy existed for the party by resort to equity. Thus in *Jackson v. Roberts*, 7 Wend. 83, where the sheriff's deed recited a sale under four executions, and the defendant offered to show by parol that in fact the sale was only made under one, the evidence was rejected. The court affirmed the ruling, saying that it was not admissible as a defense in that action; but, they add, such exclusion will not work a mischief to the party suffering thereby, since he can have relief by a summary application to the court under whose authority the officer acts, or through the medium of a court of equity. To the same effect is *Swick v. Sears*, 1 Hill (N. Y.), 17. Under our former system, it will hardly be questioned that on a bill filed by the present defendant, setting forth and establishing the facts found in this case, he would be entitled to have the deed corrected, and to be quieted in his title to the land. But this resort is no longer necessary, since, by our present system, an equitable defense may be interposed as well in an action of ejectment as in any other form of proceeding, and the defendant may also claim in the same action any affirmative relief to which he shows himself to be entitled.

I should hardly be willing to concede that, by the legitimate application of any rule of evidence, or within any clearly adjudged case, the evidence given before the referee was objectionable. The question is not as to what was the intention of the parties officiating at the sale, nor is it sought, strictly, to contradict the deed, and make it speak a language utterly at variance with its purport and meaning. But the point of inquiry is, What, as a matter of fact, was done by the sheriff at the sale? As to this, there is no contradictory evidence; but it is past all doubt or dispute that he did not sell the sixty-three acres, but expressly excepted them from the sale. Beyond all question, he so intended to express himself in the certificate; and when he recited that the lands conveyed by Tuttle to Brewster, Perry, Church, and Smith were excepted and reserved, he spoke of Tuttle as the grantor, and assumed the others to be his immediate grantees, as all were but Smith. The statute only makes the certificate presumptive evidence of the facts stated in it, and it clearly appears that the certifi-

cate recites a fact either falsely or mistakenly; and it is immaterial which. The presumption is thus overcome by evidence that it is wrong, and it should be corrected. The plaintiff in this case stands in no better position than if this were a deed *inter partes*, in which case no authority denies that the deed can be reformed. He was the purchaser at the sale. He stood by and heard the proclamation of the sheriff, that the sixty-three acres were excepted from the sale, and he purchased knowing that he was not bidding upon this land, and that he was to have no title to it. Being chargeable with notice before he received his deed, it is both dishonest and inequitable for him to lay by for fourteen years after he has received his deed, during all which time the property has been constantly occupied by others under a title which no one pretended to question, and then seek to recover land to which, of right, he has not the shadow of a claim.

The case of *Mason v. White*, 11 Barb. 173, which is much relied on by the counsel for the plaintiff, decides nothing adverse to these views; or if it does, it cannot be followed as an authority in this court. There, the deed was given, not to the purchaser at the sheriff's sale, but to the assignee of the certificate, a third party who did not appear to have been present at the sale, and was chargeable with no notice of what there took place. The question also was entirely different. The description of the land in the certificate and deed was so vague and uncertain that it was doubtful which of two pieces, either of which might be made to answer the description, was really intended to be sold; and the point of the inquiry was to ascertain what was the intention of the sheriff. The whole evidence was of the most vague and undecisive character, so much so as to induce the court to say they should have come to a conclusion upon it, differing from that of the referee. In such a case, it may well be that such evidence should not be received. But when the learned judge in that case states that although, as between man and man, deeds may be explained and reformed by reason either of fraud or mistake, but that the deed of a sheriff cannot thus be reformed, he states a proposition for which I can find no authority in the books, and from which I am constrained to dissent. The only case referred to for this doctrine is *Jackson v. Delancy*, 13 Johns. 539 [7 Am. Dec. 403], which certainly decides nothing more than that in a sheriff's deed the land must be described with reasonable certainty. The deed in that case, having under-

taken to convey, with two parcels well described, all the other lands of William Earl, of Stirling, in the county of Ulster, it was held to be void for uncertainty. No such principle as this was necessary to the decision in the case of *Mason v. White*, 11 Barb. 173, which can well stand without its aid; and if fully carried out, this doctrine would place both the certificates and the deeds of sheriffs utterly beyond the reach of the law, although its aid were invoked upon the clearest proof of inadvertence, mistake, or fraud.

3. There is no difficulty in this case arising from the provisions of the statute (2 R. S. 302, sec. 52), requiring bills for relief to be filed within ten years after the cause thereof shall accrue. In the first place, this case does not come within the letter of the statute, which applies to bills filed by a plaintiff for specific relief, and not to a defendant resisting an unrighteous claim by an equitable defense. But if it is within its spirit, the statute does not bar the defendant's claim for relief. *Varick v. Edwards*, 11 Paige, 290, is a decisive authority to show that when a party to whom land belongs in equity is in possession and is afterwards evicted by one claiming a legal title, the statute does not begin to run until such eviction. A bill, consequently, may be filed at any time within ten years after the eviction. Here, the plaintiff really had no legal title in the strict sense of the term; and neither the defendant nor any of his predecessors in the occupation and ownership of the land had any reasonable ground even of suspicion that he would, after the lapse of fourteen years, attempt to put such a construction upon his deed as to disturb a possession so long and so quietly held. The defendant is chargeable neither with knowledge nor notice of any such claim until this suit was brought. The reply alleges that the supposed mistake in the deed was discovered by Moore and the other grantees more than ten years before the commencement of this suit. Of this allegation, not a particle of proof was offered upon the trial, and from the very nature of this case it is manifest that none of the parties can be presumed to be chargeable in law with any such knowledge.

The judgment should be affirmed.

All the judges concurred upon both grounds; DENIO, J., preferring to put the judgment upon the construction of the sheriff's deed.

Judgment affirmed.

REFORMING SHERIFF'S DEED.—In *Zingsem v. Kidd*, 29 N. J. Eq. 516, it was held that a mistake in the description of land in a sheriff's deed may be corrected by a court of equity. And in *Colie v. Jamison*, 13 Nat. Bank. Reg. 4, it is said, citing the principal case, that a sheriff's deed may be reformed and a mistake therein corrected, if all the parties in interest are before the court. Notwithstanding these cases, it is well settled by the great weight of authority that an action to reform a sheriff's deed which has been improperly or defectively executed cannot be maintained: *Freeman on Executions*, sec. 332; *McCall v. White*, 73 Ala. 562; *Lewis v. Owen*, 64 Ind. 446; *Kepfer v. Force*, 86 Id. 81; *Moreau v. Detchemendy*, 18 Mo. 522; *Allen v. Moss*, 27 Id. 354; *Ware v. Johnson*, 55 Id. 500; *Bright v. Boyd*, 1 Story, 478. In the case of *Lewis v. Owen*, 64 Ind. 447, Biddle, J., delivering the opinion of the court, said: "Can a sheriff's deed be reformed in the description of the premises, or can the defects in the description be aided by extrinsic averments? We think not. To do so would be to change the effect of the proceedings and decree upon which it is founded. A final judgment of a court cannot be affected in that way. Upon principle and by authority, this question is well settled." The reason why such an action cannot be sustained is, that it would contravene the well-established rule that courts of equity cannot aid the defective execution of statutory powers. That rule is thus stated by Mr. Justice Story in delivering the opinion of the court in *Bright v. Boyd*, 1 Story, 487: "It is a well-settled doctrine that, although courts of equity may relieve against the defective execution of a power created by a party, yet they cannot relieve against the defective execution of a power created by law, or dispense with any of the formalities required thereby for its due execution; for otherwise the whole policy of the legislative enactments might be overturned:" See also 1 Story's Eq. Jur., secs. 96, 177; 2 Pomeroy's Eq. Jur., sec. 834; *Ware v. Johnson*, 55 Mo. 500. In delivering the opinion of the court in this case, Adams, J., said: "A sheriff, in sales of land on execution, acts in the exercise of powers conferred on him by statute. His authority to make a deed is derived from the statute, and no court, except the court under whose process he acts, can supervise his proceedings. If he actually levies on a particular tract of land and sells the same as levied on, and by mistake falsely describes the land in his deed, he may, under the supervision of the court issuing the process, make a new deed, which will, as to parties and privies and all purchasers with notice, relate to the time of the sale, and pass the title from that time. If the sheriff who made the sale becomes incapacitated to make the new deed, our statute provides that it may be made by another sheriff, and these provisions of the statute must be pursued, and furnish the only remedy in such cases. It is a well-settled principle, which needs no illustration or citation of authorities, that a court of equity cannot aid the imperfect execution of a statutory power."

But while a court of equity cannot, in general, reform a sheriff's deed that has been defectively or improperly executed, the grantee in such deed is not left without a remedy. If a deed is given to a purchaser at an execution or judicial sale, which for any cause is void or incorrect, he is entitled to have another one, which shall be valid in form, and conformable to the facts of the case. If a sheriff has made a defective deed, either he or his successor in office may be compelled to execute another deed that shall be valid and correct; and such amended deed will ordinarily relate back to the date of the original one: *Freeman on Executions*, sec. 332; *Macey v. Clabaugh*, 1 Gilm. 26; *Kruse v. Wilson*, 79 Ill. 233; *Thornton v. Miskimmon*, 48 Mo. 219; *Adams v. Thomas*, 6 Binn. 254; *Doe v. Miller*, 10 U. C. Q. B. 65.

Where a mortgage misdescribes the property intended to be mortgaged, the mistake can be corrected by a proper proceeding before foreclosure, or in an action to foreclose; but if the mistake is carried into the decree of foreclosure, the execution, the advertisement, and the sheriff's deed, the purchaser at the sheriff's sale cannot then maintain an action to correct the mortgage and the decree and the subsequent proceedings and the deed: *Mahan v. Reese*, 6 Blackf. 215; *Rogers v. Abbott*, 37 Ind. 138; *Miller v. Kolb*, 47 Id. 220; *Angle v. Speer*, 66 Id. 488; *Conyers v. Mericles*, 75 Id. 443; *Kepfer v. Fores*, 86 Id. 81. In *McCall v. White*, 73 Ala. 562, it was decided that the Alabama statute authorizing the court from which the execution issued to order the successor of a sheriff, who died or went out of office before executing a conveyance, to execute the conveyance to the purchaser at the sale, did not confer upon such court the power to direct and order the reformation of a sheriff's deed defective because of a mistake common to the sheriff and the purchaser. And in *Butcher v. Buchanan*, 17 Iowa, 81, it was held that a party cannot be compelled by a bill in equity to perform a parol promise to correct a mistake in the description of land conveyed by a sheriff's deed.

THE PRINCIPAL CASE IS CITED IN *Pücher v. Hennessy*, 48 N. Y. 422, to the point that an equitable defense may be set up in an action to recover damages for an alleged breach of contract, upon a jury trial; and in *Cramer v. Benton*, 64 Barb. 525, in *Howland v. Newark Cemetery Association*, 66 Id. 367, and in *Cipperly v. Cipperly*, 4 Thomp. & C. 347, to the point that the statute of limitations does not begin to run against an equitable right to reform a deed, till an attempt is made to assert the deed against the party in possession.

CONDIT v. BALDWIN.

[21 NEW YORK, 212.]

EXISTENCE OF CORRUPT AND UNLAWFUL INTENT ON PART OF LENDER TO TAKE ILLEGAL INTEREST is essential in order to make a transaction **USURIOUS**.

WHERE AGENT TRUSTED WITH MONEY TO INVEST AT LEGAL INTEREST acts, without the knowledge or authority of his principal, a *bonus* for himself, as the condition of making a loan, this will not constitute usury in the principal or affect the security in his hands.

WHERE AGENT, IN MAKING LOAN, SECURES BONUS FOR HIMSELF WITHOUT HIS PRINCIPAL'S KNOWLEDGE, the principal does not, by receiving the security and seeking to enforce it, ratify such unauthorized act of the agent.

ACTION on promissory note. Defense, usury. On the trial, it appeared that the plaintiff placed in the hands of S. K. Williams, an attorney at law, the sum of four hundred dollars to invest for her at lawful interest. George C. Mills, as agent for the defendant, Baldwin, applied to Williams for a loan of four hundred dollars, and an agreement was made between them that Williams should receive a *bonus* of twenty-five dollars. When the money was handed to Baldwin, he asked

what were the charges, and Mills replied forty dollars. Baldwin then paid that sum to Mills. Baldwin did not know how this money was disposed of by Mills, who retained fifteen dollars for himself, and gave twenty-five dollars to Williams. The plaintiff recovered judgment, and the defendants appealed.

Frederick E. Cornwall, for the appellants.

Henry R. Selden, for the respondent.

By Court, DAVIES, J. The statutes of this state prohibit any person from taking or receiving for the loan of money more than seven per cent per annum. They also provide that any person who shall pay or deliver in money, goods, etc., on such loan, any greater sum than is thus allowed, may recover in an action against the person who shall have taken or received the same, the excess of interest so paid. It is also provided that any person who shall receive any greater interest, discount, or consideration than is prescribed, shall be deemed guilty of a misdemeanor, and on conviction shall be punished by fine or imprisonment, or both: 1 R. S. 772, etc., secs. 2, 3, 15. And by section 5, all notes, etc., taken on such usurious loans are declared void. In the present case, it is not alleged or pretended that the plaintiff has personally taken or received any illegal interest on the loan made to the defendants, or that she had any knowledge, until the trial of this cause, of the secret arrangement made by Mills, the agent of Baldwin, the borrower, with Williams, her attorney and agent, whereby the latter received a *douceur* for his private and exclusive benefit. The plaintiff, a non-resident of the state, sends her money here to invest, according to the laws of this state. All the authority given to Williams as her agent and attorney, to transact the business of his principal must, in the absence of any counter proof, be construed to transact it according to the laws of the place where it was to be exercised. The law will never presume that parties intend to violate its precepts: *Owings v. Hull*, 9 Pet. 607.

It is the essence of an usurious transaction that there shall be an unlawful and corrupt intent, on the part of the lender, to take illegal interest, and so we must find before we can pronounce the transaction to be usurious: *Nourse v. Prime*, 7 Johns. Ch. 77 [11 Am. Dec. 403]. In *Bank of United States v. Waggener*, 9 Pet. 399, Story, J., in delivering the opinion of the court, says that to constitute usury within the prohibitions of the law, there must be an intention knowingly to contract

for or take usurious interest; for if neither party intend it, but act *bona fide* and innocently, the law will not infer a corrupt agreement. When, indeed, the contract upon its very face imports usury, as by an express reservation of more than legal interest, there is no room for presumption, for the intent is apparent, *res ipsa loquitur*. But when the contract on its face is for legal interest only, then it must be proved that there was some corrupt agreement, or device or shift to cover usury, and that it was in the full contemplation of the parties. In support of these propositions, numerous authorities are cited. In this case, there is nothing on the face of the contract reserving more than legal interest. The real parties to the transaction are the plaintiff and the defendants; and to render the transaction usurious, there must have been a corrupt agreement, an *aggregatio mentium*. It is not sufficient that the defendants intended to make it usurious, so that when called on to return the money thus obtained by a fraudulent device, they could pay it by availing themselves of the protection of the statute. The intention to take the usury must have been in the full contemplation of the parties, not of one party, but of both, to the transaction. Now we have seen that the plaintiff never intended to violate the law, never authorized any such violation, and never knew or had any intimation that her agent or attorney had violated it. Can it be truly said that the plaintiff has ever made the usurious agreement, which it is essential to find was made by her before we can sustain the defense in this cause? It is not pretended she made it herself, but it is said it was made by her agent, and therefore it is her agreement, and she must suffer the consequences of his acts. This is upon the trite maxim, *qui facit per alium, facit per se*. The authority given to the agent was, as has been shown, to loan her money at legal interest, and according to the laws of this state. But the agent, instead of adhering to his instructions, at the solicitation of the defendant, Baldwin's agent, departs from these instructions and violates the law. Is this the act of the principal, by which she can be bound?

If a master command his servant to do what is lawful, and he do an unlawful act, the master shall not answer, but the servant for his own misbehavior; otherwise, it would be in the power of every servant to subject his master to what actions or penalties he pleased: Bac. Abr., tit. Master and Servant, L. In *Middleton v. Fowler*, 1 Salk. 282, Holt, C. J., places the law upon its proper foundation, when he states it as a general posi-

tion that no master is chargeable with the act of his servant, but when he acts in the execution of the authority given him. In other words, when a servant quits sight of the object for which he was employed, and without reference to his master's business or orders, commits from his own malice some willful and independent act, he is no longer presumed to be acting in pursuance of his general authority as a servant, and his master is not responsible for the act which he does. The rule that when an agent commits a wrong in the transaction of the business of his principal, the principal is liable for the injury produced by such wrong, has no application to the present case. That rule cannot apply where the agent when committing the wrong is bargaining on his own account, for his own private advantage exclusively, and this is known to the person with whom he is bargaining. It could only apply where the person dealt with is deceived or wronged, which in no sense is the present case. Baldwin's agent was not misled or deceived by any act of the plaintiff's agent. He well knew that in reference to the twenty-five dollars Williams was acting and contracting on his own behalf and for his own benefit exclusively. He did not assume in that matter to act for or represent the plaintiff, or that what he was doing was in any manner to inure to her benefit or advantage. In this case, Williams availed himself of his position as the plaintiff's agent, to make a contract on his own account and for his own individual benefit. In thus dealing, he did not act or assume to act as the plaintiff's agent. He required compensation for a service which he alleged he rendered to Baldwin. It was his individual affair, not that of the plaintiff, and if it was a shift or device on his part to take and receive usurious interest to himself on this loan, he has subjected himself to the penalties of the statute: *Wilkes v. Coffield*, 3 Hawks, 28; *Commonwealth v. Frost*, 5 Mass. 53.

It was conceded on the argument that the plaintiff had not subjected herself to an indictment for misdemeanor; that she was not liable *criminaliter* for these acts of her agent. Does not this concede too much on the part of the defendants? Is it not a concession that she has not taken and received any usurious interest on this loan. If so, how can it be contended that she has forfeited her money loaned, so far as she is concerned, legally? The agent has taken and received the gratuity or usury, and not the principal. To render the transaction usurious as to this plaintiff, we have to establish that

she took and received the unlawful interest, and from this fact we infer the corrupt intent. Now, in the present case, it is undeniable that Williams himself took and received the twenty-five dollars, paid for alleged services rendered by him. If he took it and received it as the plaintiff's agent, then he took and received it for her and as her money. But on the facts disclosed in this case, can it be for a moment contended that the plaintiff could have recovered this money from Williams as so much money paid to him for her use? Clearly not. Again, by the third section of the statute cited (*supra*), it is provided that if any person shall pay any greater sum for the loan of money than is allowed by law, he may recover such excess beyond the legal rate of interest in an action against the person who shall have taken and received the same. Baldwin had an action, therefore, to recover this excess; but against whom could he have maintained it? Certainly not against the plaintiff; she never took or received it. Her agent was never authorized to take and receive it. On no principle could the action have been maintained against her; and it is equally clear that it could have been against Williams, if it was a shift to cover usury, for he was the person who took and received it, and retained it and applied it to his own use. We think these tests conclusively show that the plaintiff did not take or receive, or agree to take or receive on this loan of four hundred dollars, any greater sum than the legal rate of interest, and that the defense of usury is not sustained.

But it is urged with great earnestness and ability, that the plaintiff, by accepting the note and commencing this suit upon it, has ratified all the acts of her agent connected with the loan and attendant upon its inception. We have looked carefully at all the authorities cited by the learned counsel for the defendants, and we think they fail to sustain the proposition contended for. The plaintiff, by receiving and accepting the note for the amount of her money, and which she loaned through her agent, only ratified the contract of loan at the rate of interest expressed in the note. She had no knowledge of, and cannot be held to have ratified, the payment by Baldwin's agent to Williams, of the twenty-five dollars, usuriously by him taken, as is said. We think the cases fully sustain this view of the plaintiff's act, in receiving the note and commencing suit thereon.

When an act is done for another, by a person not assuming to act for himself but for such other person, though with-

out any precedent authority whatever, it becomes the act of the principal, if subsequently ratified by him. In that case, the principal is bound by the act, whether it be for his detriment or his advantage, and whether it be founded on contract or tort, to the same extent and with all the consequences as if done by previous authority. But when the agent did not assume to act for another, but acted for himself and for his own benefit, a subsequent ratification does not bind the principal: *Wilson v. Tumman*, 6 Man. & Gr. 238. Where a landlord authorized a bailiff to distrain for rent due from his tenant, directing him not to take anything except on the demised premises, and the bailiff distrained cattle of another, supposing them to be the tenant's, beyond the boundary of the farm, and the cattle thus taken were sold, and the landlord received the proceeds, the landlord was held not to be liable in trover for the value of the cattle, unless it was found that he ratified the act of the bailiff with knowledge of the irregularity, or chose, without inquiry, to take the risk upon himself and to adopt the whole act; and it was also held that by adopting and ratifying what he had authorized, he did not adopt and ratify the unauthorized acts of his agent. In *Bush v. Buckingham*, 2 Vent. 83, the plaintiff made a loan of fifty pounds, at a legal rate of interest. She referred the borrower to her scrivener, who would draw the bond to secure the loan, and the scrivener, in error and against her will, included therein more than lawful interest. In a suit on the bond, the defendant interposed the defense of usury, but it was overruled, as there was no intent on her part to take or receive more than lawful interest; and it was held that by commencing suit on the bond she did not ratify the act of her agent, in providing for the payment of more than legal interest, but that she might recover the amount loaned with lawful interest.

In *Buckley v. Guildbank*, Cro. Jac. 678, it was resolved that a bond given on the twenty-third of May, 1617, on loan of one hundred and twenty pounds, conditioned for the payment of one hundred and thirty-two pounds upon the twenty-fourth of May next ensuing, was for the payment of that sum on the next day, and therefore on its face usurious; and it was held that, forasmuch as the agreement is found to be to make the loan for a year, and that the assurances were for the payment at the end of the year, and as by the scrivener's mistake it is made payable the next day, it is not usury within the statute,

for there was not any corrupt agreement betwixt them, and the act of a stranger shall not bring him within the danger of the statute, especially it being found that he did not require payment until the end of the year. *Nevison v. Whitley*, Cro. Car. 501, was an action of debt on bond for one hundred pounds, dated twelfth of July, with condition for the payment of fifty-eight pounds at the end of six months. The defendant pleaded the statute of usury, and that the obligation was void. The plaintiff replied that he lent the money for a year, and that the defendant should pay eight pounds for the forbearance for a year, and that the plaintiff would not demand it until the expiration of a year, and by the scrivener's mistake it was made payable at the half year's end, and he, not knowing thereof, accepted the bond. It was objected that this allegation was against the words of the bond. But the whole court held, the plaintiff might well make the allegation, for it is showing the true agreement that no interest was to be paid by said agreement but such as stood with the law. The case of *Baxter v. Buck*, 10 Vt. 548, is not unlike the present. The plaintiff, as administratrix of William Baxter, held a note of two hundred and fifty dollars, made by the defendant, and the same was presented to him for payment by her son, Portus Baxter. On that occasion, a new note was given by the defendant for the same amount, and the time of payment was agreed to be extended by Portus Baxter, on the defendant agreeing to pay twelve per cent interest on the amount of the note, which he did by giving his note to Portus Baxter for such interest. The court held that this note for the usurious interest was taken by Portus without the consent or knowledge of the plaintiff, and inasmuch as there was a *bona fide* debt due to her, and the note in suit was only for the just amount due, it would not be void if Portus Baxter, without her consent, received a note to himself for any further sum.

The appellant's counsel relies with much confidence upon the case of *Austin v. Harrington*, 28 Vt. 130. A careful examination of that case will show that it is not in conflict with what was decided in *Baxter v. Buck*, 10 Id. 548. In this case, the court affirm the rule laid down in that, and say it was a case of a limited or special agency, in which the employment was only for that single transaction, and where the principal was not bound by any act of the agent not expressly authorized by her. The court say they have no occasion to question the soundness of that decision, as the case then under considera-

tion was not one of that character. It was that of the dealings of a general agent in the transaction of her business, and being such general agent, the plaintiff, with full knowledge of all the facts, had ratified his act.

In any view which we have taken of this case, we do not see that the twenty-five dollars paid to Williams was for the benefit of the plaintiff, or that she had any interest whatever in it. While we intend to uphold the law prohibiting the taking of usury, in its integrity, so long as it remains on the statute book, we are not called upon to punish the innocent, at the call of a confessedly guilty party who has enticed her agent into a violation of the statute, which is now sought to be availed of to defraud her of money undeniably hers, and loaned, so far as she is personally concerned, in good faith, and upon such an agreement on her part "as stood with the law."

The judgment appealed from should be affirmed.

SELDEN, CLERKE, WRIGHT, and BACON, JJ., concurred.

COMSTOCK, C. J., filed a dissenting opinion.

DENIO and WELLES, JJ., dissented.

Judgment affirmed.

TO CONSTITUTE USURY, EXISTENCE OF CORRUPT INTENT to take more than the law allows for the use of money is necessary: See note to *Davis v. Garr*, 55 Am. Dec. 392, where this subject is discussed; also *Schoop v. Clarke*, 1 Keyes, 185; S. C., 4 Abb. App. Dec. 238; *Smith v. Marvin*, 27 N. Y. 141; *Mutual L. I. Co. v. Kashaw*, 66 Id. 546; *Wyck v. Brown*, 14 Hun, 539; *Moore v. Bogart*, 19 Id. 228; *Palmer v. Call*, 7 Fed. Rep. 139; S. C., 2 McCrary, 522, all citing the principal case.

IF BONUS IS EXACTED FROM BORROWER BY AGENT OF LENDER, without the latter's knowledge, the lender is not affected thereby, nor is the security in his hands usurious: See note to *Davis v. Garr*, 55 Am. Dec. 395, where this question is considered; also *Ballinger v. Bourland*, 87 Ill. 516; *Boylston v. Bain*, 90 Id. 285; *North v. Sergeant*, 33 Barb. 352; *Fellows v. Commissioners etc. of Oneida*, 36 Id. 658; *Lee v. Chadsey*, 2 Keyes, 557; S. C., 3 Abb. App. Dec. 49; *Elmer v. Oakley*, 3 Lans. 37; *Sniffen v. Koechling*, 45 N. Y. Super. Ct. 64; *Stout v. Rider*, 12 Hun, 576; *Van Buren v. Stokes*, 3 Thomp. & C. 513; *Estevez v. Purdy*, 66 N. Y. 448, overruling 6 Hun, 47, where the principal case was distinguished; *Van Wyck v. Watters*, 81 N. Y. 355, all citing the principal case.

WHEN AGENT IN MAKING LOAN SECURES BONUS FOR HIMSELF without the principal's knowledge, the principal does not ratify and adopt the act by receiving the security and seeking to enforce it: *Thompson v. Craig*, 16 Abb. Pr., N. S., 33; *Smith v. Tracy*, 36 N. Y. 84, both citing the principal case. Where an agent for a particular purpose, who is not a general agent, does an unlawful act without the knowledge or authority of his principal, the latter

is not liable to the penalties of such act: *Hoover v. Greenbaum*, 31 Id. 311, citing the principal case. A principal has a right to disapprove and disaffirm an illegal contract entered into by his agent without his authority: *Arnot v. Pittston & E. Coal Co.*, 2 Hun, 596; S. C., 5 Thomp. & C. 147, citing the principal case.

THE PRINCIPAL CASE IS DISTINGUISHED in *Erickson v. Bell*, 53 Iowa, 630; *Porter v. Mount*, 45 Barb. 430; *Bank of Salinas v. Alvord*, 31 N. Y. 475; *Alger v. Gardner*, 54 Id. 365; *Wyeth v. Bramif*, 84 Id. 632; and criticised in the dissenting opinion of Davis, J., in *Bell v. Day*, 32 Id. 168.

KORTRIGHT v. CADY.

[21 NEW YORK, 342.]

TENDER OF MONEY DUE ON MORTGAGE AT ANY TIME BEFORE FORECLOSURE DISCHARGES LIEN of the mortgage, though made after the law-day and not kept good.

WHERE TENDER MERELY DEFEATS PARTICULAR REMEDY, BUT DOES NOT DISCHARGE DEBT, it is not necessary to show continued readiness to pay or to bring the money into court.

ACTION to foreclose a mortgage. The defendant Cady was a subsequent grantee of the equity of redemption. On the trial, he proved that after the day for payment of the money secured by the mortgage had passed, he tendered to the plaintiff the amount due for principal and interest. The plaintiff refused to receive it unless Cady would also pay certain taxes which the plaintiff had paid. It was held that Cady was under no obligation to pay these taxes. There was no evidence that the tender was kept good. The plaintiff had the usual judgment of foreclosure, and for a sale of the mortgaged premises. Cady appealed to the general term in the first district, where the judgment was affirmed, whereupon he appealed to this court.

Joshua M. Van Cott, for the appellant.

Joseph Blunt, for the respondent.

By Court, DAVIES, J. The common law recognized two kinds of landed security, respectively known as the *vivum vadium*, and *mortuum vadium*. The *vivum vadium* consisted of a feoffment to the creditor and his heirs, until out of the rents and profits he had satisfied himself his debt. The creditor took actual possession of the estate, and received the rents and applied them from time to time in liquidation of the debt. When it was satisfied, the debtor might re-enter and maintain

ejectment, and it was said to have been called *vivum vadium*, because neither debt nor estate was lost.

This mode of security is said not to have been very general, and it was superseded by the *mortuum vadium*, or mortgage, so called because on breach of condition the estate was rendered indefeasible in the mortgagee, and absolutely lost to the mortgagor. Littleton, section 332, thus describes the *mortuum vadium*, or mortgage: "Item: if a feoffment be made upon such condition that if the feoffer pay to the feoffee at a certain day, etc., forty pounds of money, that then the feoffee may re-enter, etc. In this case the feoffee is called the tenant in mortgage, which is as much as to say in French, *come mortgage*, and in Latin, *mortuum vadium*; and it seemeth that the cause why it is called a mortgage is, for that it is doubtful whether the feoffer will pay, at the day limited, such sum or not; and if he doth not pay, then the land which is put in pledge upon condition for the payment of the money is taken from him forever, and so dead to him upon condition, etc. And if he doth pay the money, then the pledge is dead as to the tenant."

Upon the execution of such a mortgage, the legal estate vests in the mortgagee, subject to be defeated on performance of the condition by the mortgagor. To divest the estate of the mortgagee, it was necessary for the mortgagor to make payment at the day according to the condition of the mortgage; or if, at the appointed day, legal tender of the money was made and refused, the condition was satisfied equally as if payment had been made, and the mortgagor or his heirs might re-enter. This appointed day for the payment of the money, to secure which the mortgage was given, became known in legal parlance as the "law-day." But a distinction was taken between a sum in the nature of a gift secured on the land and where the security was given to secure a debt due. The former was, in the case of a tender and refusal, absolutely lost; but the latter, the debt, was regarded as still subsisting as a personal duty, and might be recovered by action at law. As if A borroweth a hundred pounds of B, and after mortgageth lands to B, upon condition for payment thereof, if A tender the money to B, and he refuseth it, A may enter into the land, and the land is freed forever of the condition; but yet the debt remaineth, and may be recovered by action of debt. But if A, without any loan, debt, or duty preceding, enfeoff B of land upon condition for the payment of a hundred pounds to B, in the nature of a gratuity or gift, in that case if he tender the

hundred pounds to him according to the condition, and he refuseth it, B hath no remedy therefor: Co. Lit. 209 b. Littleton, in section 335, says that it is to be remembered that when such tender of the money is made, and the feoffee refuse to receive it, then the feoffee hath no remedy by the common law, because it shall be accounted his own folly that he refused the money when a lawful tender of it was made to him. The same writer, in section 338, says that in all cases of condition for payment of a certain sum, in gross, touching lands or tenements, if lawful tender be once refused, he which ought to tender the money is of this quit, and fully discharged forever afterwards.

Coke, in his Commentaries, in reference to these rules, as applicable to tenders and their effect, say it is to be implied that the tender is made at the due time and place according to the condition. The reason for this is obvious, under the rules already stated, as applicable to the absolute vesting of the estate in England in the mortgagee, upon the condition broken. If tender or payment was not made at the law-day, according to the condition, the estate vested absolutely in the mortgagee; and by the strict rules of the common law, all interest or right therein, of redemption, passed from the mortgagor. If the mortgage debt was afterwards paid by the mortgagor, a reconveyance of the estate by the mortgagee was necessary to vest the same in the mortgagor. By the civil law, the debtor might redeem the estate on payment of his debt, at any time before sentence passed. The doctrine of forfeiture of the common law was decidedly opposed to this principle. In the eye of equity, the absolute forfeiture of the estate, whatever might be its value, on the breach of the condition, was regarded as a flagrant injustice and hardship, although perfectly accordant with the system on which the mortgage itself was grounded. The courts of equity, therefore, stepped in to moderate the severity with which the common law followed the breach of the condition. Leaving the forfeiture to its legal consequences, they operated on the conscience of the mortgagee, and acting *in personam*, and not *in rem*, they declared it unreasonable that he should retain for his own benefit what was intended as a mere pledge; and they adjudged that the breach of the condition was in the nature of a penalty which ought to be relieved against, and that the mortgagor had an equity to redeem on payment of principal and interest and costs, notwithstanding the forfeiture at law. Thence grew up the system

in England of filing bills in equity to redeem, and in this state the filing of bills in equity by the mortgagee to foreclose and cut off this right of redemption in the mortgagor.

The rule in England was therefore ancient and well settled, that payment on the law-day extinguished the interest of the mortgagee in the lands mortgaged; and tender and refusal at the same time produced the same result. But payment after and acceptance did not revest the estate in the mortgagor without a reconveyance from the mortgagee; and a tender and refusal would, of course, not produce that result. The mortgagor's only remedy was to avail himself of the benefit of the rule in equity, and file his bill to redeem. The only question presented for our consideration in this case is, whether a tender of the sum due on a mortgage, after the day appointed by it for its payment, extinguishes the lien of the mortgage on the land covered by it.

We have seen that by the common law such tender and refusal upon the law-day extinguishes the lien of the mortgage, though the debt remains. In this state, the law is well settled that a mortgage is a mere security or pledge of the land covered by it for the money borrowed or owing, and referred to in it, and that the mortgagor remains the owner of the estate mortgaged, and may maintain trespass as against even the mortgagee: *Runyan v. Mersereau*, 11 Johns. 534 [6 Am. Dec. 393]. The debt, in the eye of the law, thus becomes the principal, and the landed security merely appurtenant and secondary; and the rights of the parties must be governed by those principles of law applicable to analogous cases. Acceptance of payment of the amount due on a mortgage, at any time before foreclosure, has always been held to discharge the incumbrance on the land; as acceptance of the amount for which personal property was held discharged it from the pledge. Tender and refusal are equivalent to performance: *Kemble v. Wallis*, 10 Wend. 374. This is to be taken with the reservation already stated, that the debt or duty remained, and that the rejected tender, at or after the stipulated time of payment or performance, has the effect only to discharge the party thus making it from all the contingent, consequential, or accessory responsibilities and incidents of his contract, but without releasing his prior debt: *Coit v. Houston*, 3 Johns. Cas. 243. In *Hunter v. Le Conte*, 6 Cow. 728, the supreme court held that a tender of rent takes away the right to distrain till a subsequent demand and refusal; but it does not take away the right

to sue for the rent as for a debt. It only saves the interest and costs. And that a tender of rent makes a distress wrongful, though the tender be not made till after the rent day. It will readily be perceived that the principles of this case bears directly upon the question now under consideration; and it is not perceived, if it be sound, why a tender and refusal of the amount due on a mortgage does not extinguish its lien, equally with a tender of rent and refusal, which, as we have seen, extinguishes the right of distress. But a still closer analogy to the present question is presented by the law of tender, as to the lien on goods pledged. Lord Chief Justice Holt, in his opinion in the celebrated case of *Coggs v. Bernard*, 2 Ld. Raym. 909, speaking of the fourth class of bailments, says: "If the money for which the goods are pawned be tendered to the pawnee before they are lost, then the pawnee shall be answerable for them; because the pawnee, by detaining them after the tender of the money, is a wrong-doer, and it is a wrongful detainer of the goods, and the special property of the pawnee is determined." So also Comyn: "By tender of the money, the property in the goods is determined, and the pledge ought to be returned. But if the pawnee refuses to restore the pledge upon tender, trover lies against him:" Com. Dig., tit. Mortgages, A, and cases there cited.

Holding, as we do, therefore, in this state, that the land mortgaged is but a security for the debt due to the mortgagee, in other words, a pledge to him to secure its payment, it is difficult to see why the principles enunciated and well settled in reference to the pledge of personal property do not apply, and why a tender and refusal at any time of the full amount of the debt due does not extinguish the lien of the mortgagee or pledgee in the one case as it clearly does in the other.

But I think we are not left at liberty to settle this case on principle, but are to regard it as authoritatively disposed of by the courts of this state. A very careful examination of the decisions has brought my mind to the conviction, contrary to my first impression, that we should regard the question now presented as not open to further discussion. I shall recur to the cases in which this question has arisen; and I think an examination of them will lead to the same conclusions to which I have arrived.

The first in chronological order is that of *Jackson v. Crafts*, 18 Johns. 110, decided in the supreme court in 1820. In that case the defendant, the mortgagor, while the advertisement of

the sale of the mortgaged premises was pending, tendered to the plaintiff, an assignee of a bond and mortgage on premises occupied and owned by the defendant, the amount due on the mortgage, and the expense of the advertisement of sale. The tender was made to the attorney for the plaintiff, who had in his hands the bond and mortgage for foreclosure. The money was refused and the sale took place, and the plaintiff became the purchaser and brought ejectment for the premises. The case turned upon the effect of the tender made, as it was conceded, after the law-day. The court held that the tender and refusal, although made after the law-day, extinguished the lien of the mortgage, and that the plaintiff could not recover. This case has been criticised, and its authority attempted to be weakened, because in the citations from Bacon and Coke the distinction was not noticed that they referred to and spoke of the effect of tenders at the law-day. But an examination of the context of the opinion shows, I think, that the learned judge who delivered it was not unmindful of this fact, and intended to hold that, in the light mortgages were regarded in this state, it was quite unimportant whether the tender was made at the law-day or after. The court, in that case, certainly held that a tender after the law-day extinguished the lien of the mortgage.

In *Merritt v. Lambert*, 7 Paige, 344, decided by Chancellor Walworth in 1838, he held that a tender of the amount due on a mortgage after the law-day did not extinguish the lien of the mortgage. He reviews the decision of the supreme court in *Jackson v. Crafts*, 18 Johns. 110, and holds that it is not sound law.

The same question arose again in the supreme court, in the case of *Edwards v. Farmers' F. I. & L. Co.*, 21 Wend. 467. It is to be observed that this case and that of *Merritt v. Lambert*, *supra*, originated from the same transaction. Edwards, the mortgagor, after the law-day had passed, tendered to the defendants, the mortgagees, the full amount of the mortgage and the costs and expenses of a foreclosure and sale upon which the defendants had become the purchasers. It was contended on the part of the plaintiff, and so held by the court, that the defendants, by the sale at which they became purchasers, on the foreclosure of a mortgage to them, stood in the same position they did originally as mortgagees, and had no higher or other rights or equities. Other questions arose in the case; but the main one discussed, and upon which the

supreme court passed, was whether the tender and refusal after the law-day extinguished the lien of the mortgage. The opinion of the court was delivered by Cowen, J., who exhausted the law on the subject. His reasons and the authorities there cited seem to me fully to sustain the conclusion to which he arrived, that in this state a tender and refusal of the amount due, at any time after the mortgage debt became due, extinguished the lien of the mortgage. Chief Justice Nelson concurred in this result—Justice Bronson dissenting. The case was taken to the court for the correction of errors, and the judgment of the supreme court was affirmed: *Farmers' F. I. & L. Co. v. Edwards*, 26 Wend. 541. Two opinions were delivered in that court: one by Chancellor Walworth, in favor of reversing the judgment of the supreme court, on two grounds: 1. That the agreement for sale made by the company with the Merritts, mentioned in the pleadings, was a valid sale by the defendants of the premises within the meaning of their charter, and that consequently they were no longer the owners of the mortgaged premises; 2. That the tender of the mortgage money, after there had been a default to pay it at the day, cannot have the legal effect of depriving the mortgagee of his security, if for any cause he does not think proper then to receive the amount so tendered. The chancellor enlarges upon the second ground, and restates the reasons which he had given for his opinion in *Merritt v. Lambert*, 7 Paige, 344. He says: "It now remains for the other members of this court to decide whether the vice-chancellor and Mr. Justice Bronson and myself on the one side, or the other two justices of the supreme court and the assistant vice-chancellor on the other, have taken the correct view of the important legal questions involved in the case." It does not appear from the reported cases whether the vice-chancellor and Mr. Justice Bronson concurred with the chancellor in his views on the second point above referred to, and which, it is evident, he regarded as the controlling one in the case. This question is the main one considered by Senator Verplanck, who delivered the opinion of the court for affirmance. He discusses this question with his usual learning and research, and arrives at the clear conclusion that a tender of the amount due on a mortgage after the law-day extinguishes the lien of the mortgage. It does not appear distinctly that all the judges voting for affirmance concurred with him upon this ground; but I think the case, as stated by the reporter, shows that they must have done so.

If we should adhere to the rule laid down by this court in *James v. Patten*, 6 N. Y. 9 [55 Am. Dec. 376], it must be held that the judges concurring in the opinion delivered by Senator Verplanck are to be regarded as agreeing with him upon all the points discussed; but, irrespective of that rule, we think it quite clear that the case was decided on that point.

The same question was again presented in the supreme court in *Arnot v. Post*, 6 Hill, 65. The court was then held by the same judges as sat in *Edwards v. Farmers' F. I. & L. Co.*, 21 Wend. 467. Bronson, J., delivered the opinion of the court in this case, and says: "It has always been held that a tender at the day discharged the lien of the mortgage; and although a clear departure from the old law, it is fully settled in this state that a tender after the day will have the same effect, citing *Jackson v. Crafts*, 18 Johns. 110, and *Edwards v. Farmers' F. I. & L. Co.*, *supra*. I know that in the case of *Edward v. Farmers' F. I. & L. Co.*, *supra*, the law-day was extended by the charter of the company; but the broad principle was asserted that a tender at any time before foreclosure, although the law-day has passed, will have the effect of discharging the lien of the mortgage." The judgment in this case was reversed in the court for the correction of errors, by a vote of eleven to nine: *Post v. Arnot*, 2 Denio, 344. Senator Hard, who delivered the first opinion for reversal, says: "It is undoubtedly a well-settled principle that a tender at the day of the amount secured by a mortgage upon lands extinguishes the lien. It has been decided in this state, although the principle is a departure from the ancient law, that a tender after the day and before foreclosure discharges the lien." But he adds that "where the mortgage has been foreclosed, there is no authority for saying that a tender to the purchaser under the foreclosure will extinguish his title." He then discusses the cases of *Jackson v. Crafts*, 18 Johns. 110, and *Edwards v. Farmers' F. I. & L. Co.*, 21 Wend. 467, and holds that they decide nothing in conflict with this proposition. Upon this ground, he was for reversal of the judgment of the supreme court; and he certainly advances nothing in conflict with what he states had been decided in this state, to wit, that a tender after the day and before foreclosure discharges the lien. An examination of the opinion delivered by Senator Porter will show that his vote for reversal proceeded on the ground that the purchaser at the mortgage sale could not be divested of the title he acquired at it by a tender of the

amount due on the mortgage by the mortgagor. I do not understand this senator as advancing any idea in conflict with the rule of decision as stated by Senator Hard.

It is true that Senator Johnson, in his opinion, proceeds to show that the cases of *Jackson v. Crafts* and *Edwards v. Farmers' F. I. & L. Co.*, *supra*, fail to establish the rule that an unaccepted tender to the creditor by one entitled to redeem a mortgage, made after the law-day, will extinguish the lien of the mortgage. After discussing these cases, he says: "I think, therefore, it may be safely assumed that there is no binding authority requiring us to hold that a mere tender after the day of payment has passed will have the effect of discharging the lien." He then discussed the effect of the sale upon the right of redemption; and upon both grounds was in favor of reversing the judgment of the supreme court. Senator Sedgwick concurred with Senator Johnson substantially, and senators Bockee and Clark delivered verbal opinions in favor of reversing, on the ground that a tender after the law-day did not extinguish the lien. Talcott, senator, who delivered an opinion for affirmance, discusses both grounds; and in reference to the tender extinguishing the lien of the mortgage, says, after citing the cases of *Jackson v. Crafts*, 18 Johns. 110, and *Edwards v. Farmers' F. I. & L. Co.*, 21 Wend. 467, and that of *Burnett v. Denniston*, 5 Johns. Ch. 35: "These cases hold that a tender will discharge the lien of the mortgage, though not made until after the law-day; and that doctrine is in accordance with the theory of mortgages now well established by a series of recent decisions." Gardiner, president, delivered an opinion in favor of affirmance, discussing only the effect of the sale; and Senator Lester also delivered an opinion for affirmance, on what grounds it is not stated. Assuming that the nine members who voted for affirmance concurred in the opinion of Senator Talcott, and that the five senators who voted for reversal, and expressed no opinion, concurred in the views expressed by senators Johnson, Sedgwick, Bockee, and Clark, we then have eleven members of the court affirming it to be the well-settled rule in this state that a tender after the law-day will extinguish the lien of the mortgage.

This brief review of the course of decisions in this state, it is submitted, shows that, in truth, the rule has prevailed here, and been well recognized, ever since the decision of *Jackson v. Crafts*, 18 Johns. 110, in 1820; and that the doubts thrown upon that decision by the chancellor, in *Merritt v. Lambert*,

have never been adopted by any other court in this state, but were distinctly repudiated and overruled by the court of errors, in *Edwards v. Farmers' F. I. & L. Co.*, 21 Wend. 467, and by the supreme court subsequently in *Arnot v. Post*, 6 Hill. 65; and this rule was again affirmed in that case by the court of errors, in 1845. We are bound, therefore, I think, to regard this as the settled law of this state, and are not at liberty to return to the old rule of the common law, which has been shown to be wholly inapplicable to the light in which mortgages are regarded in this state.

It is not perceived how the mortgagee is to be embarrassed, or his security impaired, by the adoption of this rule, as seems to be supposed by the chancellor, in *Farmers' F. I. & L. Co. v. Edwards*, 26 Wend. 552. If the mortgagor does not tender the full amount due, the lien of the mortgage is not extinguished. The mortgagee runs no risk in accepting the tender. If it is the full amount due, his mortgage lien is extinguished and his debt is paid. This is all he has a right to demand or expect, and all he can in any contingency obtain. His acceptance of the money tendered, if inadequate and less than the amount actually due, only extinguishes the lien *pro tanto*, and the mortgage remains intact for the residue. A much greater hardship might be imposed, and serious injury be produced, by holding that the mortgagor cannot extinguish the lien of the mortgage by a tender of the full amount due. It has never occurred to any judge to argue that a pawnee was in great peril, and in danger of losing the benefit of his pawn, by the enforcement of the well-settled rule, that a tender of the amount of the loan and interest, and refusal, extinguished the lien on the pawn. Littleton well says that it shall be accounted a man's own folly that he refused the money when a lawful tender of it was made to him. The only effect upon the rights of the mortgagee is, that the land or thing pledged is released from the lien, but the debt remaineth.

The only remaining question to be considered is, whether the tender in this case was well made, it not being followed with the allegation of *touts temps priet*, and the money not having been brought into court. It will be seen, by reference to the authorities, that these are not required when the tender has only the effect of extinguishing the lien, and does not operate to discharge the debt or sum owing. In the latter case, the averment of *touts temps priet*, followed by bringing the money into court, is essential to a good plea of tender:

Hume v. Peploe, 8 East, 168; *Giles v. Hartis*, 1 *Ld. Raym.* 254. But if a man make a bond for the payment of a loan of money, and afterwards makes a defeasance for the payment of a lesser sum at a day, if the obligor tender the lesser sum at the day. and the obligee refuse it, he shall never have any remedy by law to recover it, because it is no parcel of the sum contained in the obligation. And in this case, in pleading of the tender and refusal, the party shall not be driven to plead that he is yet ready to pay the same, or to tender it in court: *Co. Lit.*, note to sec. 335. The same principle was held by the supreme court of this state, in *Hunter v. Le Conte*, 6 *Cow.* 728, and cases there cited.

No question in reference to the taxes arises in this cause, upon the facts found by the referee. The referee found in favor of the appellants upon the question relating to them; and to his finding in that respect, the plaintiff took no exception. It is not, therefore, to be reviewed in this court.

The judgment appealed from should be reversed, and a new trial ordered, with costs to abide the event.

CONSTABLE, C. J., also delivered an opinion in favor of reversing the judgment of the supreme court. He said the only question in the case was, whether a tender made after a mortgage is due, by the owner of the lands mortgaged, discharges the lien. This question, he said, was fully determined forty years ago, by the supreme court of New York, in the case of *Jackson v. Crafts*, 18 *Johns.* 110. Nearly twenty years later the same question arose concurrently, or nearly so, in the court of chancery and in the supreme court. The case in each of those courts originated in the same transaction. The case in the supreme court was *Edwards v. Farmers' F. I. & L. Co.*, 21 *Wend.* 467; and that in the court of chancery was *Merritt v. Lambert*, 7 *Paige*, 344. In the latter case, Chancellor Walworth was of opinion that a mere tender, unaccepted, did not discharge the lien, and he criticised the opinion of Judge Woodworth, in *Jackson v. Crafts*, *supra*, for the reason that the English authorities which he referred to related to a tender on the day when the mortgage debt became due. On this criticism the learned chief justice observed, that by the ancient common law, a mortgage was a grant of land defeasible on the condition subsequent of paying the money at the exact time specified. On a failure to perform that condition, the grant was absolute, and neither tender nor payment made afterwards could have the effect to revert the title. The specified time of payment was called the law-day, because after default the legal rights of the mortgagor were gone. The estate became vested in the mortgagee absolutely, because the original grant was freed from the condition. After quoting the following language of the chancellor: "For these reasons it is, that the mortgagor, or his assigns, or subsequent incumbrancers upon the mortgaged premises, are driven to a bill to redeem, where the mortgagee refuses to receive what is equitably due to him. But this could not be necessary if a mere tender of the amount due after the mortgage has become forfeited would have the legal effect of discharging the mortgaged premises from

the lien of the mortgage"—the chief justice said: "It is a self-evident proposition, which the chancellor need not have undertaken to prove, that when the law was that even payment after the law-day would not discharge the mortgage, a mere tender could not have such an effect. He was probably quite correct in saying that the English authorities cited by Judge Woodworth referred to tender at the day, because those authorities were of a date when even payment after the day did not divest the estate or interest of the mortgagee. But Judge Woodworth and the eminent men who sat with him on the bench of the supreme court considered, what the learned chancellor seems to have failed to notice, the fundamental change which the law of mortgage had undergone long before the decision in *Jackson v. Crafts* was pronounced. In this state, a mortgage had always been regarded as a mere security or pledge for the debt; and the rule had always been that payment at any time discharged the lien, so that no reconveyance of the estate was necessary. It seems to me, therefore, that the authorities cited by the supreme court, on the effect of tender, were extremely pertinent to the question, because they showed very conclusively that a tender at the law-day had the same effect on the mortgage as a payment on that day. Underlying this particular proposition, of course, was the more general doctrine that when a certain effect must be given to a payment, a tender will have a like effect. This was what the supreme court undoubtedly meant, and the authorities cited simply showed the application of the principle to the law of mortgage. The principle itself, or its application, was not questioned by the chancellor; but he did not consider, so far as appears, that the rule had become entirely settled giving to a payment after the day, and on the day, precisely the same consequences. I think, therefore, with great respect for a jurist so learned and accurate, that he differed from the supreme court, and criticised its opinion, without due reflection upon the real ground of the decision."

The learned judge then turned to the case of *Edwards v. Farmers' F. I. & L. Co.*, 21 Wend. 467, which he reviewed at some length. He said that the supreme court, with a new bench of judges, in that case reaffirmed its position in *Jackson v. Crafts*, 18 Johns. 110, after a most elaborate and searching examination. The case was then carried to the court for the correction of errors, which affirmed the judgment of the supreme court. Referring to the case in the latter court, the learned chief justice said: "The cause was most fully argued by some of the ablest gentlemen at the bar, and the decision of the court was pronounced beyond all possibility of cavil on the very point now in controversy. . . . No one who will read the case with a little attention can fail to be satisfied that it was a decision most deliberately pronounced upon the very question now to be determined." The chief justice then reviewed the cases of *Arnot v. Post*, 6 Hill, 65, and *Post v. Arnot*, 2 Denio, 344, and stated that the decision in the latter case did not reverse the rule on the point under consideration, or unsettle the law which had been so well established. In reference to the case, he said: "It is a perfectly just commentary upon the case to say that it settled no legal proposition whatever, and much less must it be received as unsettling a rule which had become firmly fixed in the jurisprudence of this state."

Having stated the clear result of the authorities on the question under consideration, the chief justice added that the renewed discussion of the question might seem to be unnecessary, but he could not help saying that a decision by the court in opposition to the rule laid down in the cases referred to would introduce into the law of mortgage an inconsistency too plain to escape observation. He said that the doctrines originating in the courts of

equity, respecting the rights of mortgagor and mortgagee, have been incorporated into the code of the common law, so that there is now no difference between the two systems; and this has been true in substance for nearly a century past. In support of this view, he cited *Martin v. Mowlin*, 2 Burr. 978; *King v. St. Michaels*, Doug. 632; and *King v. Edington*, 1 East, 288. In New York, he said, the rules of law and equity in regard to mortgages have never differed in any degree; it being the doctrine of both systems that a mortgage is but a personal interest merely. This proposition was fully determined in *Ransom v. Mersereau*, 11 Johns. 534; S. C., 6 Am. Dec. 393.

It has been held in repeated decisions that the mortgagee cannot, in any way, convey, devise, mortgage, or encumber the land, while the mortgagor can do all these things; that judgments against a mortgagee do not affect his interest in the lands mortgaged; that such an interest does not descend to heirs, but goes to the personal representative as a chose in action; that it is not subject to dower or curtesy; that it passes by a parol transfer, and by any transfer of the debt; and, finally, that it is extinguished by payment, or by whatever extinguishes the debt. Replying to the suggestion of the fact that the mortgagee could maintain ejectment against the mortgagor, until the revised statutes abolished that remedy, and that, even since those statutes, the mortgagee, being in possession, may retain it until the debt is paid, he said that this does not present any anomaly or inconsistency in the law. The mortgagee's right in such cases is but a right to recover or to retain the possession of the pledge for the purpose of paying the debt. Such a right is but the incident of the debt, and has no relation to a title or estate in the lands. Ejectment, in its origin, was only a remedy to recover possession according to some temporary right, and it was only by resort to fiction that the title was at length allowed to be brought into controversy. There is nothing inconsistent or anomalous in allowing the possession once acquired for the purpose of satisfying the mortgage to be retained until that purpose is accomplished. When that purpose is attained, the possessory right ceases instantly, and the title is, as before, in the mortgagor without a reconveyance. The notion that a mortgagee's possession, whether before or after default, enlarges his estate, or in any respect changes the simple relation of debtor and creditor between him and his mortgagor, rests upon no foundation. There are terms of the ancient law that have come down to us, having long survived the principles of which they were the appropriate expression. These terms now engender confusion and uncertainty in minds that derive their conceptions from words rather than things. The term "law-day" once very expressively marked the time when all legal rights were lost and gone by the mortgagor's default. But there is now no such time until foreclosure by a judicial sentence or sale under a power. So the words "redemption" and "equity of redemption" survive, although the ideas they once represented have long since become obsolete. And the same is the case with reference to the word "forfeiture" so often used in connection with this subject. There is now no forfeiture of a mortgaged estate. Until foreclosure, the right of the mortgagor is the same the day after a default that it was the day before. That the tender of the money due on a mortgage made at any time before foreclosure, discharges the lien, is the logical result of premises which are admitted to be true. These are that the mortgagor has the same right after as before a default to pay his debt, and so clear his estate from the incumbrance; and that payment being actually made, the lien thereby becomes extinct. We have, then, only to apply an admitted principle in the law of tender that tender is equivalent to payment as to all things which are incidental and accessory to the debt.

Replying to the argument that mortgagees would be put to great inconvenience if at any period, however remote from the time of maturity, they must know the amount of the debt and accept a tender on peril of losing their security, the learned chief justice said: "The force of this argument is not perceived. As a tender must be unqualified by any conditions, there can never be any good reason for not accepting the sum offered, whether it be offered when it is due or afterwards. By accepting the tender, the creditor loses nothing, and incurs no hazard. If the sum be insufficient, the security remains. It is only by refusing that any inconvenience can possibly arise. But whatever may be the consequences of refusal, the creditor may justly charge them to his own folly."

Selden, Clarke, Wright, Bacon, and Denio, JJ., concurred; Denio, J., putting his concurrence on the ground that the question was so far determined by authority in this state, that it would now be indiscreet to re-examine it in the light of reason and the analogies of the law.

Welles, J., delivered a dissenting opinion. He said that the only question in the case was whether the tender made by the defendant, Cady, was, under the circumstances, effectual to extricate the premises in question from the lien created by the mortgage of Blunt to Miller. He reviewed the cases cited in the prevailing opinions, and in speaking of *Jackson v. Crafts*, 18 Johns. 110, said that the question of the time when the tender in that case was made does not appear to have been raised; nor does the distinction between a tender made on the day, and one made afterwards, appear to have been considered by the court. The authorities cited in that case, he said, prove nothing more than that a tender at the time and place, according to the condition of the mortgage, will discharge the lien. He quoted with approval the language of the chancellor in *Merritt v. Lambert*, 7 Paige, 344. Of *Edwards v. Farmers' F. I. & L. Co.*, 21 Wend. 467, he said: "It may well be that in the decision of the case a majority of the judges entertained the opinion that a tender after the day does not, *per se*, discharge the lien of a mortgage." He said that the decision of the same case in the court of errors, reported in 26 Id. 541, is no authority upon the precise question to be decided in the case at bar. The case of *Post v. Arnot*, 6 Hill, 65, he said, proves nothing with certainty on either side of the question. He admitted that the case of *Arnot v. Post*, 2 Denio, 344, does not conclusively prove that the rule of the common law on this subject is still the law of this state, but he said that its strong tendency is that way. In his opinion the question is still an open as well as a vexed question, and the weight of authority in favor of the rule as it existed at the common law. He said that mortgages are substantially what they always were, and that he knew of no difference between the right of the mortgagor, or of the person owning the equity of redemption, to redeem the premises from the lien of the mortgage, as that right now exists, and as it existed in the time of Coke or Littleton. He thought the rule contended for by the plaintiff to be reasonable, convenient, and just. If at the time fixed for the payment of the debt the mortgagor pays or tenders payment and the mortgagee refuses to receive, his lien is gone forever; but if the mortgagor allows the law-day to pass without payment or tender, he then is a defaulter. It seemed to him that the old rule is the only just and wholesome one that can be recognized, and that it is as favorable to the mortgagor as he can reasonably ask. The rule contended for by the defendant would, he thought, in many cases operate as a bounty to negligent and defaulting debtors, and mortgagees would, under its workings, be induced to purchase their peace at an unjust sacrifice of their rights.

For the reasons stated by him, he said that the rule of the common law, in relation to the effect of a tender after the law-day, is still the law of this state; and as the tender in this case had not been kept good, and the defendant's answer contained no offer of payment, and the facts found by the court did not show that the tender had in any sense been kept good, or that the defendant was ready to pay, etc., he thought he could have no benefit by reason of it, and that the judgment should be affirmed with costs.

Judgment reversed.

TENDER OF MONEY DUE ON MORTGAGE AT ANY TIME BEFORE FORECLOSURE DISCHARGES LIEN OF MORTGAGE, though made after the law-day and not kept good: *Hartley v. Tatham*, 2 Abb. App. Dec. 339; *Waleh v. Rutgers F. I. Co.*, 13 Abb. Pr. 37; *Hastings v. Kelly*, 1 Abb. Pr., N. S., 75; S. C., 1 Robt. 173; *Miner v. Beckman*, 14 Abb. Pr., N. S., 6; S. C., 50 N. Y. 343; *Harris v. Jez*, 66 Barb. 237; *Campbell v. Parker*, 9 Bosw. 333; *Halstead v. Swartz*, 46 How. Pr. 161; S. C., 1 Thomp. & C. 563; *Houbie v. Volkenning*, 49 How. Pr. 170; *Hetsell v. Barber*, 6 Hun, 541; *Hill v. Syracuse etc. R. R. Co.*, 8 Id. 296; *Hutchings v. Munger*, 41 N. Y. 158; *Lawrence v. Maxwell*, 53 Id. 23; *Ritter v. Phillips*, Id. 589; *Hayes v. Josephi*, 26 Cal. 545; *Mahler v. Newbauer*, 32 Id. 171; *Ketchum v. Crippen*, 37 Id. 226, all citing the principal case. The principal case is also cited, but not approved on this point, in *Orain v. McGoon*, 86 Ill. 432; and in *Tompkins v. Batie*, 11 Neb. 150. The lien of a mortgage is discharged by a tender: *Fiffany v. St. John*, 5 Lana. 155; S. C. on appeal, 68 N. Y. 318; *Frost v. Yonkers Savings Bank*, 70 Id. 556; *Hartley v. Tatham*, 1 Robt. 259; *Caruthers v. Humphrey*, 12 Mich. 278, citing the principal case.

IN NEW YORK, MORTGAGE IS MERELY SECURITY FOR DEBT, and the title remains in the mortgagor, until divested by foreclosure: *New York L. I. & T. Co. v. Covert*, 6 Abb. Pr., N. S., 162; *Miner v. Beckman*, 11 Id. 151; S. C., 42 How. Pr. 36; *Ten Eyck v. Craig*, 2 Hun, 465; S. C., 5 Thomp. & C. 76; *Knickbocker L. I. Co. v. Nelson*, 13 Hun, 324; *Van Amburgh v. Kramer*, 16 Id. 206; *Madison Ave. Ch. v. Oliver St. Ch.*, 41 N. Y. Super. Ct. 378; *Trium v. Marsh*, 3 Lana. 511; *Power v. Lester*, 23 N. Y. 531; *Stoddard v. Hart*, Id. 560; *Kelly v. Smith*, 26 Id. 20; *Mason v. Lord*, 40 Id. 485; *Hubbell v. Moulson*, 53 Id. 227; *Trium v. Marsh*, 54 Id. 604; *Trustees of Union College v. Wheeler*, 61 Id. 118; *Ten Eyck v. Craig*, 62 Id. 421; *Heyland v. Badger*, 35 Cal. 414, all citing the principal case. A forfeiture by failure to comply with the terms of a mortgage gives no new right: *Levy v. Mayor etc. of N. Y.*, 3 Robt. 200, citing the principal case.

THE PRINCIPAL CASE IS CITED to these points in the following cases: The right of a junior incumbrancer to extinguish the lien of a senior incumbrance continues until that incumbrance has been foreclosed: *Peabody v. Roberts*, 47 Barb. 97; a mortgagee lawfully in possession under a mortgage, upon which some amount is due, can retain such possession against the mortgagor until such amount has been paid: *Madison Ave. Ch. v. Oliver St. Ch.*, 73 N. Y. 94; the remedy of the owner in fee is not confined to a bill in equity to redeem; but he has a concurrent remedy law; he may tender the amount due upon the mortgage, and bring ejectment at any time before twenty years' adverse possession has run against him: *National F. I. Co. v. McKay*, 21 Id. 191; the acceptance of a tender does not prejudice the right of the party to recover the balance, if more is rightly due, while to refuse it is to lose interest, if it shall be found that the sum tendered was all that was due: *Roosevelt v. New York & H. R. R. Co.*, 45 Barb. 558; S. C., 30 How. Pr. 230; *Gray v. Green*, 9 Hun, 340; it is necessary to bring the money tendered into court, in order to deprive a creditor of his interest, though not necessary to discharge a lien:

Roosevelt v. Bull's Head Bank, 45 Barb. 584; *Simpson v. French*, 25 How. Pr. 465. In case of a tender at common law before suit brought, like one on a promissory note, it is necessary for the purpose of pleading it, for the defendant when sued, to pay the money into court, and give notice at the time of serving his answer: *Knight v. Beach*, 7 Abb. Pr., N. S., 246; when a factor having possession of goods consigned to him on which he has a lien for charges, makes a valid general assignment for the benefit of his creditors and delivers the goods to his assignee, the latter is the proper person to whom the owner should tender the charges in order to acquire a right to their possession: *Cook v. Kelly*, 9 Bosw. 360.

THE PRINCIPAL CASE IS DISTINGUISHED in *Frost v. Yonkers Savings Bank*, 8 Hun, 28; in *Dodge v. Feary*, 19 Id. 278; and in *Harris v. Jan*, 55 N. Y. 423.

SWEZEY v. LOTT.

[21 NEW YORK, 481.]

WHERE SHERIFF LEVIES EXECUTION UPON SUFFICIENT PROPERTY WHICH IS TAKEN FROM HIS POSSESSION under replevin suit, in which he obtains judgment, it is his duty to prosecute the sureties in the undertaking of the plaintiff in such replevin suit, and he is not entitled to indemnity from the plaintiff in the execution as a condition of his prosecuting the undertaking. .

IN ACTION AGAINST SHERIFF FOR NOT RETURNING EXECUTION WHERE NO EXCUSE IS SHOWN for his not prosecuting the undertaking in replevin, except the absence of an indemnity for costs, the sheriff is liable for the amount of the debt, and has no counterclaim for expenses in the replevin suit, although they may be within the terms of the bond to indemnify him.

ACTION commenced in the city court of Brooklyn against the defendant, as late sheriff of Kings county, for not returning an execution issued on a judgment in favor of the plaintiff against one Jenkins. The defendant levied upon sufficient property to satisfy the execution, but it was claimed by Mary Turner. The plaintiff then executed to the defendant a bond of indemnity against all actions, costs, and expenses in consequence of levying upon and selling the property. Mrs. Turner brought an action of replevin against the defendant, and had the property delivered to her, she executing to the coroner an undertaking, as required by the code. Her suit resulted in a judgment in favor of the defendant. The defendant issued an execution against Mary Turner in the replevin suit, which was returned by the coroner, to the effect that he could find no property of hers whereof he could make the money. No action appeared to have been commenced on the undertaking. The defendant asked the court to instruct the jury that the

suit of Mary Turner was a sufficient excuse for not returning the execution, and that the defendant was under no obligation to prosecute the undertaking, and that the indemnity bond rendered the parties to it liable to the defendant for the costs and expenses of the replevin suit, and these he sought to recover by way of counterclaim, that claim having been set up in the answer. The court refused to so instruct the jury, but instructed them that as the defendant had levied on sufficient property to satisfy the execution, it was for him to show a sufficient excuse for not having returned it; that the return of the execution against Mary Turner unsatisfied, did not, of itself, furnish any excuse, inasmuch as the defendant had failed to show what, if anything, he had done towards enforcing the undertaking which was an equivalent for the property levied on. The plaintiff had a verdict for the amount of the unpaid judgment, with interest. The supreme court, on appeal, reversed the judgment of the city court. The plaintiff thereupon appealed to this court.

W. B. Ackley, for the appellant.

James M. Campbell, for the respondent.

By Court, DENIO, J. The supreme court was of opinion that as the bond of indemnity which the plaintiff had given to the defendant, as sheriff, did not extend to an action on the undertaking, and would not have afforded an indemnity against costs in such an action, the defendant was justified in omitting to do anything further after the return of the execution against Mary Turner unsatisfied. In this, I think, the court fell into an error. The bond was given in consequence of the claim of Mary Turner that the property levied on belonged to her. By executing the bond, the plaintiffs assumed the whole risk which the sheriff would incur in consequence of that claim, and the defendant then proceeded to execute the *fi. fa.* The result of the replevin suit showed conclusively that her claim was unfounded, and that the property really belonged to the judgment debtor. The undertaking given by the plaintiff in the replevin had then become the equivalent for the property; and though, in form, it ran to the coroner, the defendant was entitled to maintain an action upon it, and could claim to have it assigned to him: 2 R. S. 533, sec. 64; *Acker v. Finn*, 5 Hill, 293. I do not find any provision of law which would entitle the plaintiffs, who had no property, general or special, in the goods, to an assignment of the undertaking. By an arrange-

ment between them and the defendant they might, no doubt, have taken upon themselves the burden of prosecuting the undertaking, and it would not have been unreasonable in them to have done so. But in point of law, the further duty of pursuing the remedy on the undertaking belonged to the defendant, as sheriff, and this duty he neglected for more than a year after the return of the execution against Mary Turner. There is nothing in the case to show that the sureties were not abundantly responsible, or that the money could not have been collected, if the defendant had enforced the undertaking. It seems that at common law an action on the case would not lie against a sheriff for an omission of duty in the execution of process of this kind; but the statute has given an action to the creditor against him for not returning the execution; and the settled doctrine of the courts is, that where it has not been returned, he is *prima facie* liable for the debt, but may mitigate the damages by showing that the defendant had no property of which the judgment could be levied. Where, as in this case, there was sufficient property, and he has not made the money, nor returned the execution, nor shown any sufficient reason why he has not done so, he is chargeable with the debt: *Bank of Rome v. Curtiss*, 1 Hill (N. Y.), 275; *Pardee v. Robertson*, 6 Id. 550; *Ledyard v. Jones*, 4 Sandf. 67; S. C., 7 N. Y. 550.

It has been urged that it might happen that an action by the defendant against the sureties would be fruitless, as they may have become insolvent, or may have justified fraudulently, and that the sheriff might thereby incur the expense of an action for which he would have no indemnity. This might, no doubt, so turn out; but it is one of the burdens of the office which the defendant assumed, and for which he can only be compensated by the other advantages which the office confers. The duty of prosecuting the undertaking to judgment and execution was as obligatory as the levying upon the defendant's property in the first instance. Upon the proof in this case, there was nothing to raise a doubt as to the result of such a prosecution, nor any reason for calling upon the plaintiffs to furnish an indemnity against any possible loss which might be sustained. There was no ground upon which the counterclaim could be allowed. Upon the comprehensive terms of the bond, it is true that the obligors might be liable for the expenses of the suit, though the judgment was against Mrs. Turner; but until the remedy on the undertaking shall be shown to be

fruitless, it cannot be said that the defendant has suffered any loss or damage in consequence of her claim to the property or her action for its recovery.

I am in favor of reversing the judgment of the supreme court, and affirming that of the city court.

All the judges concurred.

Judgment accordingly.

LIABILITY OF SHERIFF FOR FAILURE TO RETURN EXECUTION: See *Smith v. Perry*, 70 Am. Dec. 296, note 296, where other cases are collected. A right of action against a sheriff for the mere omission of his duty to return an execution did not exist at common law: *Pect v. Hurbert*, 46 Barb. 561, citing the principal case. By his omission to return an execution, the sheriff becomes liable for the debt, unless he shows some sufficient reason; but he may show, in mitigation of damages, that the defendant had no property upon which the execution could be levied: *Wells v. Connor*, 40 N. Y. Super. Ct. 31; *Hoffman v. Connor*, 13 Hun, 542, both citing the principal case.

HOE v. SANBORN.

[21 NEW YORK, 542.]

PLEADING OF PARTY WHO RELIES ON MERE GENERAL WARRANTY OF QUALITY OF GOODS sold need not state whether the warranty is express or implied. A general averment that the vendor warranted the articles to be of a good quality is sufficient, and proof of a warranty of either kind will support the averment.

WHENEVER ARTICLE SOLD HAS SOME LATENT DEFECT WHICH IS KNOWN TO SELLER, but not to the buyer, the seller is liable for this defect, if he fails to disclose his knowledge on the subject at the time of the sale. If his knowledge is proved by direct evidence, his responsibility rests upon the ground of fraud; but in a case where the probability of knowledge on his part is so great that the court will presume its existence without proof, he is held responsible upon an implied warranty. The only difference between these two classes of cases is, that in one the *scienter* is actually proved, in the other it is presumed.

MANUFACTURER WHO SELLS GOODS OF HIS OWN MANUFACTURE IMPLIEDLY WARRANTS that they are free from any latent defect growing out of the process of manufacture; but he is not liable for any latent defect in the material which he is not shown and cannot be presumed to have known.

DIFFERENCE BETWEEN DOCTRINE OF CIVIL LAW AND THAT OF COMMON LAW in respect to implied warranties discussed by Selden, J.

ACTION on promissory note payable to the plaintiffs. The defendant in his answer alleged that he purchased of the plaintiffs a quantity of circular saws for the purchase price of which the note sued on was given; that, at the time of the

purchase, the plaintiffs "warranted said saws to be good saws, and of good quality;" and he averred that the saws were "not good saws, or of good quality," and that said saws were "of no value." The reply denied the facts alleged in the answer. Upon the trial, the defendant offered to show these facts: "At and for a long time previous to the purchase in question, the defendant was in the business of manufacturing and vending Page's circular saw-mills, and had in that business had considerable dealings with the plaintiffs. In May, 1855, he ordered of the plaintiffs the saws mentioned in the answer, for the purpose of supplying mills made and vended by him, and communicated the purpose to the plaintiffs. Upon that order, and subsequent thereto, the plaintiffs manufactured the saw in question, and forwarded the same, on the defendant's order, to John Howard & Co. at Port Huron, in Michigan. The consignees tried the saw, in a circular saw-mill made by the defendant and sold to them, and the saw was unsound and worthless by reason of softness, and was returned immediately to the plaintiffs and by them attempted to be retempered, and was again forwarded by the plaintiffs to John Howard & Co., and was found to be utterly worthless by reason of softness, and otherwise defective; and and the same was then returned to the defendant." The court rejected this offer, on the ground that the defendant, under the answer, "could not prove facts to establish an implied guaranty; that such defense must be specially pleaded." To this decision, the defendant excepted. Subsequently, the judge modified this ruling and decided to receive the evidence offered, except in so far as it was proposed to prove that the saw was manufactured by the plaintiffs for the express use of the defendant's mills. Evidence was thereupon given tending to prove that one of the saws manufactured by the plaintiffs and sold by them to the defendant, and for which the note in suit was given, through defective material or want of being properly tempered, was so soft as to be entirely useless. Defendant's counsel asked that the cause should be submitted to the jury upon this evidence, but the judge refused so to submit it, and directed a verdict for the plaintiffs. Defendant's counsel excepted. There was a judgment for the plaintiffs, which was, on appeal, affirmed at general term in the fourth district. The defendant thereupon appealed to this court.

Lyman H. Northup, for the appellant.

U. G. Paris, for the respondents.

By Court, SELDEN, J. If, to sustain the defense in this case, it was necessary to show that the plaintiffs had agreed to manufacture these saws for a specific purpose, and that when tried one or more of them proved not to be adapted to or useful for that purpose, then the rulings of the judge upon the trial may have been right. Such a contract would be entirely different from an ordinary sale, with a general warranty of quality, and would require to be specially stated. But, on the other hand, if upon every sale of a manufactured article by the manufacturer himself there is an implied warranty that the article sold is free from any latent defect growing out of the process of manufacture, then the cause should have been submitted to the jury upon the evidence given. It is not necessary, in pleading, where a party relies upon a mere general warranty of the quality of goods sold, to state whether the warranty is express or implied. A general averment that the vendor warranted the articles to be of a good quality is sufficient. Proof of a warranty of either kind will support the averment. In the view I take of this case, therefore, it is only necessary to consider whether, upon a sale by a manufacturer of articles manufactured by himself, he impliedly undertakes that such articles are of fair quality, and have no secret defect arising out of the manner in which they were manufactured.

It may not be possible to reconcile all the decisions upon the subject of implied warranties upon the sale of goods; but if we keep steadily in view the principle which lies at the basis of all such cases, we shall find that much of the apparent conflict will disappear. It is a universal doctrine, founded upon the plainest principles of natural justice, that, whenever the article sold has some latent defect which is known to the seller, but not to the purchaser, the former is liable for this defect, if he fails to disclose his knowledge on the subject at the time of the sale. In all such cases, where the knowledge of the vendor is proved by direct evidence, his responsibility rests upon the ground of fraud. But there are cases in which the probability of knowledge on the part of the vendor is so strong that the courts will presume its existence without proof; and in these cases, the vendor is held responsible upon an implied warranty. The only difference between these two classes of cases is, that in one the *scienter* is actually proved, in the other it is presumed.

It is obvious that the vendor of goods would be very likely to know whether he has a title to the goods he sells. He

knows the source from which such title was obtained, and has, therefore, means of judging of its validity which the purchaser cannot be supposed to have. Hence it is the doctrine, both of the civil and the common law, that every vendor impliedly warrants that he has title to what he assumes to sell.

Some slight doubt has been supposed to be thrown upon this doctrine in England, by the remarks of Parke, B., in the case of *Morley v. Attenborough*, 3 Exch. 500. It is, however, too well settled, both in England and in this country, to be overthrown or shaken by the *obiter dicta* of a single judge. My object is, not to establish this doctrine, which admits of no doubt, but simply to show that it rests upon the foundation here suggested, viz., the presumed superior knowledge of the vendor in regard to his title. The case of *Morley v. Attenborough*, *supra*, itself tends, in my view, to confirm this position. It arose upon a sale, by a pawnbroker, of a harp pledged with him as security for a debt. The sale was made through auctioneers, and a general catalogue was furnished to the bidders, which "stated on the title page that the goods for sale consisted of a collection of forfeited property." The court held that there was no implied warranty of title in that case. There was, perhaps, good reason why this case should be considered an exception to the general rule. The pawnbroker could not justly be presumed to have any special knowledge in regard to the ownership of the articles pledged. The probability was, that he had received them upon the faith of the pledgor's possession alone, and the purchaser was, in this respect, upon an equal footing with himself. There are other exceptions to the general rule, which have the same tendency. The case of judicial sales is one. There is no ground for presuming that the officer of the law has any peculiar knowledge on the subject of the title to the property he exposes to sale. No doubt, both the pawnbroker and the officer, if shown to have knowledge which they conceal, would be liable for fraud; or, if they could justly be presumed to have such knowledge, would be liable upon an implied warranty. It was expressly held, in the case of *Peto v. Blades*, 5 Taunt. 657, that the law raises an implied promise on the part of a sheriff, who sells goods taken in execution, that he does not know that he is destitute of title to the goods.

A very ancient and leading case on the subject of implied warranty of title, viz., *Cross v. Gardner*, Carth. 90, shows the ground of liability to be that here suggested. There, the

plaintiff sought to recover against the defendant for selling a pair of oxen as his, when they in truth belonged to another. It was objected that the declaration neither stated that the defendant deceitfully sold the oxen, nor that he knew them to be the property of another person. But the court held the defendant liable, because the plaintiff had no means of knowing to whom the property belonged, but only by the possession. This plainly implies that the defendant had better means of knowledge; and upon this presumption, the court evidently proceeded. That this was the foundation of the decision, appears also from another report of the same case, 1 Show. 68, where the ground taken was, that, "if a man, having possession of goods, sell them as his own, an action lies for the deceit." Now, deceit implies knowledge, and as no knowledge was proved, it must have been presumed.

In an older case still, viz., *Dale's Case*, Cro. Eliz. 44, the court decided, by two judges against one, that the action would not lie, because there was no allegation, or proof, that the defendant knew of the defect in his title. But, to use the language of Croke, "*Anderson, contra*, for it shall be intended that he that sold had knowledge whether they were his goods or not." The ground here taken by the dissenting judge, that every vendor is presumed to know whether he has title to the things he sells, is precisely that upon which the subsequent cases have proceeded, and one which affords a solid basis for the doctrine of implied warranty of title.

It is equally clear that implied warranties in respect to quality, wherever they are held to arise, rest upon a presumption, in the particular case, that the vendor knew of the defect. It is easy to see that, in respect to all that class of personal chattels which do not enter extensively into the business and trade of a people, and which do not pass rapidly from hand to hand, such as horses, cattle, furniture, and the like, the vendor who, in most cases, would have had the article for some time in possession and use, would be very likely to know whether it was defective, and a presumption of knowledge would, in such cases, as a general rule, be both reasonable and safe. On the other hand, with regard to those goods which are the subject of general traffic, and are habitually purchased, not for use, but to be sold again, no such presumption could fairly arise.

This distinction may serve to account, in some degree, for the difference between the civil and the common-law rule upon

the subject of latent defects in articles sold. The rule of the civil law, viz., *caveat venditor*, was adopted at an early period, and in reference, as it would seem, rather to those articles which are of general and ordinary use, than to such as enter extensively into the commerce of the country; while that of the common law, viz., *caveat emptor*, originating in a commercial age, and among a highly commercial people, naturally took the form best calculated to promote the freedom of trade. No doubt the common-law rule is, upon the whole, wisest and best adapted to an advanced state of society; and yet there is a large class of cases in which that of the civil law would serve to prevent a multitude of frauds. Take, for instance, the article of horses. Few would deny that, as to them, it would be more conducive to justice if the vendor were, in all cases, held to warrant against secret defects. But, as it would be impracticable to discriminate among the infinite variety of articles which are the subjects of sale, the common law applies the maxim *caveat emptor*, as a general rule, to all cases.

It has been frequently, but, as I apprehend, inaccurately said that, under the civil law a warranty is implied from the payment of a "sound price" for the article sold. Although paying a "sound price" may prove that the purchaser was not, it does not prove that the vendor was, cognizant of any defect. It can, therefore, have no tendency to show which of the two parties ought to bear the loss. Where, however, the price paid is less than the value of the article, supposing it to be sound, this shows that the purchaser was apprised of the defect, and that the parties contracted with reference to it. In such cases, therefore, no warranty arises. It is in this aspect alone that the price paid becomes of importance. But because the want of a "sound price" would thus prevent a warranty, it has been illogically inferred that the payment of a "sound price" was the foundation of the warranty. The truth is, that the civil law raises the warranty, because it presumes knowledge on the part of the vendor; and the want of a "sound price" prevents a warranty, because it proves equal knowledge on the part of the vendee.

The theory of the civil and of the common law, in respect to these implied warranties, is entirely different. The civil law holds that the warranty enters into and forms an integral part of the contract of sale itself, as will be seen by referring to Pothier's definition of a sale, and his statement of the obligation of the vendor to warrant against latent defects, which he

deduces directly from that definition. The definition he gives seems to be somewhat strained for the purpose of embracing that obligation: See Pothier on Contracts of Sale, Prelim. Art., and pt. 2, c. 1, sec. 4.

But the common law, with, as I conceive, better logic, derives the obligation from the general doctrine which holds vendors responsible for every species of deception. That this is the true source of this warranty at the common law will be rendered apparent by reference to three early cases, two of which have been already referred to, viz.: *Dale's Case*, Cro. Eliz. 44; *Furnis v. Leicester*, Cro. Jac. 474; and *Cross v. Gardner*, Carth. 90; S. C., 1 Show. 68. These cases show by what gradations a strong principle of justice overcame at length the technical rules of the common law, and forced the courts to sustain an action for a deceit without any averment or actual proof of willful deception.

It is possible to read, even in the meagre record we have of these three cases, the mental operations of the pleaders, at that remote period, in framing the respective declarations. They were all experimental cases, and probably enlisted the highest legal talent. The declaration in *Cross v. Gardner*, *supra*, as we know, was drawn by Mr. Justice Gould of the king's bench. This we learn from himself, in *Medina v. Stoughton*, 1 Ld. Raym. 593. The object of the pleader in each case evidently was to avoid the necessity of alleging a *scienter*, of which he has no extrinsic proof. In *Dale's Case*, *supra*, there was no averment, direct or indirect, on the subject of knowledge, and the experiment failed; the pleader having taken too great a stride to begin with, but carrying along with him, nevertheless, one third of the court. In *Furnis v. Leicester*, *supra*, the word "deceitfully," which implied knowledge, was ventured upon, replying upon the presumption of knowledge to support it; and this experiment succeeded. In *Cross v. Gardner*, *supra*, another step was taken, and a *colloquium* and averment of possession in the plaintiff were resorted to, instead of any allegation of knowledge. In this, also, the pleader was successful.

These are the cases, especially the last, which established, in the English courts, the doctrine of implied warranty of title; and my object in referring to them is to sustain the position I take, that the rule was originally based upon the presumption that a vendor knows whether or not he has title to the things which he sells. That this was so, is mani-

fest from the kind of declaration used in all these cases, viz., case for a deceit. Precisely when the form of action was changed, from case to *assumpsit*, does not appear; but it certainly was not until after the time of Blackstone, because he says: "In contracts likewise for sales, it is constantly understood that the seller undertakes that the commodity he sells is his own, and if it proves otherwise, an action on the case lies against him to exact damages for this deceit:" 3 Bla. Com. 165. It is plain, therefore, that the courts proceeded in these cases upon the ground of presumptive knowledge on the part of the vendor of his want of title.

It has already been shown to some extent that implied warranties as to quality are based, when they exist at all, upon the same assumption. But this will further appear from some of the exceptions to the common-law rule of *caveat emptor*. One of these exceptions, which has been generally recognized, is that upon the sale of provisions which are purchased, not for the purpose of resale, but to be consumed by the purchaser, there is an implied warranty that such provisions are sound and wholesome. There are two cases in our own courts which show the foundation of this exception. The first is that of *Van Bracklin v. Fonda*, 12 Johns. 468 [7 Am. Dec. 339], which was an action to recover damages for selling a quantity of beef as "good and sound," which proved "bad and unwholesome." There was in that case some evidence that the defendant knew the animal to be diseased before it was slaughtered; but the court, in giving judgment, say that "in the sale of provisions for domestic use, the vendor is bound to know that they are sound and wholesome, at his peril." Although what the court here says is that the vendor is bound to know the condition of what he sells, yet the subsequent case of *Moses v. Mead*, 1 Denio, 378 [43 Am. Dec. 676], which was more elaborately considered, shows clearly that the doctrine rests upon a presumption of knowledge on his part. The sale in that case was of one hundred and ninety-four barrels of mess beef, which proved to be tainted; and the action was *assumpsit* founded upon an implied warranty of soundness. The beef was bought, not for immediate consumption, but by merchants, for the purpose of being resold. Mr. Mann, who argued for the defendant, did not dispute the general rule, but relied upon the fact that the purchase was not for consumption. The pith of his argument was in this sentence: "Where the sale is by wholesale, the vendor has

no more opportunity of knowing their quality—the quality of the provisions sold—than the purchaser.” In giving judgment for the defendant, the court proceeded upon this ground, as is evident from the following language of Bronson, C. J. After referring with approbation to the case of *Van Bracklin v. Fonda*, 12 Johns. 468 [7 Am. Dec. 339], he says: “But there is a very plain distinction between selling provisions for domestic use and selling them as articles of merchandise, which the buyer does not intend to consume, but to sell again. Such sales are usually made in large quantities, and with less of opportunity to know the actual condition of the goods than when they are sold by retail.” The implied warranty depends, therefore, in these cases, as in all others, upon the question whether there is reason to impute to the vendor a knowledge of the defects, if any exist.

Another exception to the general rule, which has been recognized in several cases, but with some hesitation and uncertainty, is that a manufacturer, who sells goods of his own manufacture, impliedly warrants that they are free from any latent defect growing out of the process of manufacture. In regard to the justness of this exception, it would seem, aside from authority, scarcely possible to doubt. If the vendor can be proved to have had knowledge of the defect, and failed to disclose it, all agree he is liable. Is it not reasonable to presume that he who made a thing which has a defect arising solely from the manner in which it is made, is cognizant of that defect? Where the vendor has manufactured the article with his own hands, the inference of knowledge would plainly, in many cases, be strong enough to charge him, even in an action for fraud. But if the manufacturing is done by agents, the general principles of law would hold the principal responsible for those whom he employs. Wherever the vendor, therefore, has himself manufactured the article sold, or procured it to be done by others, if honesty and fair dealing are ever to be enforced by law, a warranty should be implied. The doubts which have been expressed in one or two cases in this state upon this subject, could, I think, never have arisen, if the courts had kept steadily in view the principles upon which implied warranties rest. This would also have prevented the confusion which pervades the early English cases on the subject of exceptions to the maxim *caveat emptor*. The rule that upon executory contracts for the delivery of some indeterminate thing at a future day, there is an implied war-

ranty that the article shall be of a fair quality and merchantable; the supposed rule that upon a sale of a thing for a particular purpose, there is an implied warranty that the thing shall be fit and suitable for that purpose; and the like rule that upon the sale of goods by sample, the vendor warrants that the goods shall be equal to the sample—have all been treated as exceptions to that maxim.

The first of these rules may, perhaps, be regarded as in some sense an exception, although the case is not one to which the maxim *caveat emptor* could by possibility be supposed to apply. But the other two can hardly be considered as exceptions at all. When a person, desirous to obtain an article for a particular purpose, but not being himself skilled in respect to such articles, applies to one professing to be acquainted with the subject, or who, by his occupation, holds himself out to the world as understanding it, and the latter furnishes what he alleges to be suitable, it is plainly to be inferred that both parties understand the purchase to be made upon the judgment and responsibility of the seller. In view of some such case, one or more of the English judges at an early day laid down the broad proposition that, upon the sale of goods for a specified purpose, the law raised an implied warranty that the goods sold were suitable for that purpose. In *Bluett v. Osborne*, 1 Stark. 384, Lord Ellenborough said: "A person who sells impliedly warrants that the thing sold shall answer the purpose for which it is sold." Lord Tenterden used similar language in *Gray v. Cox*, 4 Barn. & Cress. 108. Best, C. J., reiterated the doctrine in *Jones v. Bright*, 5 Bing. 533.

But it is obvious that notwithstanding the goods are sold for a particular use, if the purchaser himself understands what he wants, and selects such goods as he deems adapted to the intended use, there is no warranty. There can, therefore, be no such general rule as that referred to; but whether there is a warranty or not, must depend upon the circumstances of each particular case. This subject has been placed upon its true basis by two later English cases, viz.: *Chanter v. Hopkins*, 4 Mee. & W. 399; and *Brown v. Edgington*, 2 Man. & G. 279. In the last of these cases, Tindal, C. J., says: "It appears to me to be a distinction well founded, both in reason and on authority, that if a party purchases an article upon his own judgment, he cannot afterwards hold the vendor responsible, on the ground that the article turns out to be unfit for the purpose for which it was required; but if he relies upon the judg-

ment of the seller, and informs him of the use to which the article is to be applied, it seems to me that transaction carries with it an implied warranty that the thing furnished shall be fit and proper for the use for which it was designed."

This extract shows that these are not cases of implied warranty, in the ordinary sense of these terms. The question is one of fact as to the actual contract between the parties. It is, On whose judgment and responsibility was the purchase really made? Implied warranties do not rest upon any supposed agreement in fact. They are obligations which the law raises upon principles foreign to the actual contract—principles which are strictly analogous to those upon which vendors are held liable for fraud. It is for the sake of convenience, merely, that this obligation is permitted to be enforced under the form of a contract. However refined this distinction may appear, its non-observance has led to much of the confusion to be found in the cases on this subject.

The same may be said in regard to the doctrine that an implied warranty arises upon every sale by sample; a doctrine which, with the most obvious propriety, has been limited by the recent cases in this state (unless the goods are so situated that they cannot be examined by the buyer), to those cases where the circumstances warrant the inference that the seller actually undertook that the bulk of the commodity sold corresponded with the sample: *Waring v. Mason*, 18 Wend. 425; *Hargous v. Stone*, 5 N. Y. 73. In view of the principle settled by these cases, it is equally clear that warranties of this sort are not strictly implied warranties. They are to be made out as a matter of fact, or they do not exist at all. To infer an actual warranty from the circumstances proved, is one thing; to impute a warranty, without proof, is another and different thing, and unless we distinguish between the two, we unavoidably get into confusion.

I will refer to a single case by way of illustration; viz., *Jones v. Bright*, 5 Bing. 533, a leading case and one frequently cited. The facts were that the plaintiff purchased from the warehouse of the defendant, who was himself the manufacturer, copper for the sheathing of a ship. The defendant, who was informed of the purpose for which the copper was wanted, said: "I will serve you well." The copper, in consequence of some defect, lasted only four months, instead of four years, the usual time. Best, C. J., before whom the cause was tried, left it to the jury to determine whether the decay in the copper was occasioned

by intrinsic defect, or external accident; and if it arose from intrinsic defect, whether such defect was caused by the process of manufacture. The jury found that the decay was occasioned by some intrinsic defect, but that there was no satisfactory evidence as to the cause of that defect. The court held the defendant liable. But there is no little difficulty in ascertaining the precise ground upon which the decision was placed. It is evident that the chief justice, when he tried the cause, expected to dispose of it on the ground that the defect in the copper grew out of the process of manufacture, for he says in his opinion upon the motion for a new trial: "I declined expressing an opinion at *nisi prius*, but I expected the jury would have found that the article was not properly manufactured, for the testimony of the scientific witnesses was very clear." Still he does not seem willing entirely to abandon this ground, notwithstanding the verdict was against it, for he goes on to remark: "At all events, the warranty given by them (the defendants) is not satisfied, because the jury found that there is an intrinsic defect in an article manufactured by them."

But the chief justice seems to have been driven by the verdict to seek for some other ground upon which to rest the case. He argues, therefore, to show that the words, "I will serve you well," constitute an express warranty. He then adds: "But I wish to put the case on a broad principle. If a man sells an article, he thereby warrants that it is merchantable, that it is fit for some purpose. . . . If he sells it for a particular purpose, he thereby warrants it fit for that purpose." Mr. Justice Burrough seems to me to have taken the most sensible view of the case. He says: "I consider this as more a question of fact than of law. The question is whether the contract was proved as laid. It was so proved; and after Fisher had introduced the parties, and stated the purpose for which the plaintiff wanted the copper, the defendants warranted the article by undertaking to serve the plaintiff well."

This case has been cited, indiscriminately, to prove that upon the sale of manufactured articles, by the manufacturer himself, there is an implied warranty against defects arising from the process of manufacture; that goods sold for a particular purpose are warranted fit for that purpose, and even that there is an implied warranty in all cases of sale that the goods sold are fit for some purpose.

The case, I think, was properly decided, on the ground upon

which it was placed by Burrough, J. It was this case, more than any other, which has served to create, in the minds of some of our judges, so strong a feeling against exceptions to the maxim *caveat emptor*, that they have been disposed to reject all such exceptions without discrimination: *Wright v. Hart*, 18 Wend. 449; *Hargous v. Stone*, 5 N. Y. 73. But if we look at what the English courts have really decided, instead of what some of the judges have loosely said, we should, I think, find less occasion for deprecating their tendency in this respect towards the doctrines of the civil law, than has been supposed.

But for this hostility to all implied warranties, as to quality, it never could have been doubted that where one sells an article of his own manufacture, which has a defect produced by the manufacturing process itself, the seller must be presumed to have had knowledge of such defect, and must be holden, therefore, upon the most obvious principles of equity and justice, unless he informs the purchaser of the defect, to indemnify him against it. In such cases, if the price paid is entirely below that of a sound article, a presumption would, no doubt, arise, as under the civil law, that the purchaser was apprised of the defect.

In the present case, a portion of the alleged defect in the saw would seem to have arisen from the unsuitableness of the material of which it was made. The rule on the subject I hold to be this: The vendor is liable, in such cases, for any latent defect, not disclosed to the purchaser, arising from the manner in which the article was manufactured; and if he, knowingly, uses improper materials, he is liable for that also; but not for any latent defect in the material which he is not shown, and cannot be presumed to have known.

The judgment should be reversed, and there should be a new trial, with costs to abide the event.

All the judges concurred; COMSTOCK, C. J., and DAVIES, J., however, only in the conclusion, reserving their judgment as to some of the propositions in the opinion.

Judgment reversed, and new trial ordered.

NO IMPLIED WARRANTY OF QUALITY OF GOODS EXISTS AT COMMON LAW: See *Beirne v. Dord*, 55 Am. Dec. 321, note 323, where other cases are collected.

WHERE ONE SELLS GOODS OF HIS OWN MANUFACTURE or cultivation for a particular purpose, there is an implied warranty against defects in the process of manufacture or mode of cultivation, which will render it unfit for

the purpose: *White v. Miller*, 7 Hun, 436; S. C. on appeal, 71 N. Y. 131, citing the principal case. But where the seller is not a manufacturer of the article sold, there is no warranty implied: *Dounce v. Dow*, 64 Id. 415, also citing the principal case. A *scienter* is essential to establish an implied warranty: *Littauer v. Goldman*, 72 Id. 512, citing the principal case. Where a person desires to obtain an article for a particular purpose, and not being skilled in respect to such article, applies to one professing to be acquainted with the subject, or who by his occupation holds himself out to the world as understanding it, and the latter furnishes what he alleges to be suitable for it, it is plainly to be inferred that both parties understood the purchase to be made on the judgment and responsibility of the seller: *Cunningham v. Hall*, 4 Allen, 274, citing the principal case. But where a vendee, after opportunity to ascertain the defects accepts the article and continues to use or consume it, he waives the defect: *Holden v. Clancy*, 58 Barb. 591; S. C., 41 How. Pr. 5, citing the principal case.

THE PRINCIPAL CASE IS CITED in *McKnight v. Devlin*, 52 N. Y. 401, to the point that every vendor of chattels warrants his title to them; and in *Burch v. Spencer*, 15 Hun, 508, to the point that under an averment in a complaint that the defendant warranted the article sold, an implied or express warranty may be proved. It is also cited in *Estep v. Larsh*, 21 Ind. 195, among several other authorities, but on a point not considered in that case.

PEOPLE EX REL. LENT v. HASOALL.

[22 NEW YORK, 188.]

PRESUMPTION EXISTS THAT ASSETS OF DECEDENT WERE HELD BY ONE UNTIL HIS APPOINTMENT AS ADMINISTRATOR, where he received them under an agreement to take out letters of administration; and, therefore, in the absence of evidence to the contrary, the liability of the sureties on his administration bond attached.

EVIDENCE IS INADMISSIBLE OF ADMINISTRATOR'S INSOLVENT CONDITION AND CONVERSION OF OTHER TRUST FUNDS at and immediately before his appointment, in an action against the sureties on his administration bond, to show his conversion, prior to that time, of assets of the decedent, received by him under an agreement to take out letters of administration.

APPEAL from a judgment in favor of the plaintiff in an action against the defendants as sureties on the administration bond of John J. McPherson. On December 17, 1856, Malcolm McMartin, the father of the deceased, requested McPherson to take out letters of administration on the estate of his son, which McPherson agreed to do; and on the day following, with this understanding, McMartin handed to McPherson a note and some money belonging to the deceased. On March 23, 1857, McPherson was appointed administrator, and executed the bond in suit. McPherson died in April, 1857, having converted to his own use a large portion of the assets of McMartin, which

came into his hands. The defendants, to show a conversion of the property by McPherson before he was appointed administrator, offered to prove that at the time of his appointment he was insolvent, and that immediately before that time he had converted to his own use other trust funds, but the court rejected the evidence. The plaintiffs had a verdict, upon which judgment was entered in their favor.

Henry R. Selden, for the appellants.

C. F. Bissell, for the respondents.

By Court, DAVIES, J. It is claimed on the part of the defendants that there has been no breach of the bond; that McPherson, as administrator, did not convert and dispose of the assets of the deceased, for the reason that, as administrator, he never had any assets in his hands. It does not appear from the testimony at what period McPherson converted to his own use the assets placed in his hands to be held and used by him as administrator. In the absence of any proof to the contrary, we are to assume that he held these assets until his appointment of administrator was completed, and from thence until the actual conversion held them in that capacity. This was his agreement; this was the understanding of the parties when the assets were placed in his hands. Until the contrary appears, we are to presume that he fulfilled his agreement and performed his duty. We are not at liberty to speculate as to what he might have done, nor to infer that he violated his agreement in this instance and committed a fraud, because he was guilty of other breaches of trust. The evidence offered of such violations of duty in those instances was properly rejected, as it did not tend to show that these assets were converted prior to March 23d. The case of *Gottsberger v. Taylor*, 19 N. Y. 150, is quite in point. There, one Henry was appointed special administrator of an estate, and he employed one Smith as his agent to collect rents of the estate. Smith, previous to the sixteenth of February, 1850, had collected one thousand and eighty dollars, which he had not paid over, and was Henry's debtor to that amount. On that day, Smith was appointed special administrator in the place of Henry. In a suit upon Smith's bond, his sureties contended that they were not liable for this amount, on the ground that it was not received by Smith as administrator. But this court says that "the money collected by Smith as agent for Henry, while the latter was collector of the estate, was received by Smith in a

fiduciary character, and it would have been a violation of duty on his part to convert the same to his own use. The presumption then is, that this money remained in his hands at the time he gave the receipt to Henry. The character in which Smith held the money was then changed; before, he held it as the agent for Henry; after, in his official character as collector; then, the liability of the sureties attached." Applying these principles to the present case, McPherson held these assets, prior to his appointment, as the agent of the administrator; upon his appointment, he held them in his official character, and then the liability of the sureties attached. As he received them under an agreement to hold them to be delivered to himself as administrator, when clothed with that character, the presumption is, in the absence of any proof showing the time when he parted with them, that he continued thus to hold them, and that the same were received by him in his representative character; and, consequently, the liability of the surety attached.

The judgment of the supreme court should be affirmed, with costs.

SELDEN, J., did not sit in this case.

All the other judges concurred.

Judgment affirmed.

SURETIES' LIABILITY FOR FUNDS RECEIVED BY ADMINISTRATOR BEFORE HIS APPOINTMENT: See note to *Commonwealth v. Stub*, 51 Am. Dec. 523, where the question is considered, and the principal case cited.

FERRO v. BUFFALO AND STATE LINE R. R. Co.

[22 NEW YORK, 209.]

RAILROAD COMPANY IS REQUIRED TO USE GREATER CARE IN RUNNING ITS TRAINS THROUGH VILLAGES, where wooden buildings are so near its road as to be exposed to fire from locomotives, than in the open country.

RAILROAD COMPANY IS BOUND TO USE UTMOST CARE IN RUNNING ITS TRAINS THROUGH VILLAGES, to guard against fire to wooden buildings near its track, especially at a time when the wind is blowing from the engine towards the buildings.

OWNER OF BUILDINGS NEAR RAILROAD TRACK IS BOUND TO USE SUCH CARE in protecting them against fire from the locomotives as a man of ordinary prudence would have employed under the same circumstances; and he is not deprived of redress against the company for its negligence by the fact that, had he been more vigilant, the injury might not have happened.

IT IS QUESTION OF FACT FOR JURY, WHETHER LEAVING DOOR OF BUILDING IN COURSE OF CONSTRUCTION NEAR RAILROAD TRACK partly open, through which sparks from an engine were driven, constitutes such negligence on the part of the owner or his servants as would preclude his recovery against the railroad company for a fire caused thereby.

APPEAL from a judgment on a verdict in favor of the plaintiff, in an action against the railroad company, for negligently setting fire to the plaintiff's house. The facts are stated in the opinion.

Chauncey Tucker, for the appellant

Dyer Tillinghast, for the respondent.

By Court, BACON, J. The two questions which are presented by this case arise upon the exceptions taken to the charge of the judge upon the trial, and his refusals to charge as requested by the defendants' counsel; and these questions pertain: 1. To the degree of negligence imputed to and chargeable upon the defendants; and 2. Whether there was negligence on the part of the plaintiff which concurred in producing the result. The jury have found upon both points submitted to them in favor of the plaintiff, and the inquiry now is, whether there was any error of law in the manner in which these questions were left to the jury.

The substantial facts of the case, without entering into much detail, showed very clearly that the fire, by which the premises of the original plaintiff were consumed, was communicated by sparks from the defendants' locomotive standing still upon the side track of the defendants at a point nearly opposite the house of the plaintiff, and distant only about thirty feet from it, and with a strong wind blowing directly from the engine toward the house. During the time the engine thus stood upon the track, coals and sparks were emitted in large quantities, and were driven by the wind in the direction of the house, and no watch appears to have been kept over them, nor in fact any attention whatever on the part of any one in the defendants' employment paid to the matter. The nearness of the plaintiff's property to the engine, the constant emission of combustible matter, and the direction and force of the wind, were all circumstances calculated to admonish those having charge of the locomotive of the imminent danger of remaining in that position without exercising a prudent circumspection of the surroundings.

On the subject of the care which, under the circumstances,

the defendants were called upon to exercise, the judge instructed the jury that less care is required of a railroad company while running their trains in the country, where there is no property near their track exposed to fire, than in a village (as was the case in this instance), where buildings constructed of wood are situated so near to their road as to be exposed to fire from the locomotive, and at a time when the wind is blowing in a direction from the engine toward the buildings. Under such circumstances, they are bound to use the utmost care; and if for the want of such care, fire is communicated to such buildings, and they are consumed, the defendants are liable for the damages sustained thereby, unless the negligence of the owners of the buildings, in guarding and protecting their property, concurred in producing the result. To this charge, the defendants' counsel excepted, and asked the court to charge that if the engine was in good order, and of proper construction, and used with ordinary care, the plaintiff could not recover. This instruction was refused by the judge, and the defendants' counsel excepted.

Taken as a whole, I think this charge and refusal to charge as requested, were right. Some of the English cases have gone the length of holding that the very fact that buildings in proximity to a railroad have been fired by sparks from a locomotive, is sufficient to warrant a jury in inferring and presuming negligence without further proof. But I think we have not carried the rule in this country to that extent, and certainly not in this state. The reason given is, that the use of fire to create the motive power of a railroad engine is not only lawful but necessary, and sparks may escape notwithstanding the safeguards which science and skill have employed to limit their range: *Sheldon v. Hudson River R. R. Co.*, 14 N. Y. 218 [67 Am. Dec. 155]. There must be, therefore, some proof of negligence to create a liability arising from the exercise of a conceded right in an improper or unreasonable manner. It is quite obvious, too, that what under certain circumstances would not be even *prima facie* proof of want of care, would under a different state of facts be the highest evidence of negligence; and I think the discrimination made by the judge in this case is one founded in good sense and obvious justice; although not sustained by any direct authority, the principle on which it proceeds may be gathered from several cases decided in this court.

The case of *Rood v. New York and Erie R. R. Co.*, 18 Barb.

80, brings into view the rule upon which a railroad company may be exempted from liability for a casualty similar to the one in this case. There, the woods of the plaintiff were claimed to have been fired by sparks from the defendants' locomotives. The train was running at the usual rate of speed in the open country, and it was shown that the engine was of the most approved construction; the spark-arresters of the best pattern; and that a suitable police had been provided upon the road for the purpose of following trains and looking after fires. These circumstances were held sufficient to discharge the defendants from liability for the damages which were supposed to have been occasioned by flying sparks from the engine.

But a much higher degree of care, both in respect to the rate of speed and the watchfulness to prevent casualties, should manifestly be required when trains are passing through or remaining stationary in the streets of a city, or densely populated village; and I think it is not stretching the rule unduly in such a case to say that, under such circumstances, the railroad company is bound to use the utmost care to guard against the dangers which obviously attend such a condition. The substance of the charge, without criticising its terms with too great nicety, is that the care must be proportioned to the danger of accidents; and that where there is great danger, there must be a corresponding degree of care.

This is the rule declared in the case of *Kelsey v. Barney*, 12 N. Y. 425, and applied to the case of a collision of boats. The principle is there stated to apply to all persons traveling upon highways or navigating public waters, and in speaking of the qualifications and extent of the rule, Judge Johnson says, in his opinion, that under some circumstances a very high degree of vigilance is demanded even under the requirement of ordinary care. "Where," he says, "the consequences of negligence will probably be serious injury to others, and where the means of avoiding the infliction of the injury are completely within the party's power, ordinary care requires the utmost degree of human vigilance and foresight."

The same principle is substantially held in the case of *Johnson v. Hudson River R. R. Co.*, 20 N. Y. 65 [75 Am. Dec. 375]. The cars of the defendant were driven in the nighttime in one of the streets of the city of New York without any lights upon them, and the plaintiff's testator was run over while upon or crossing the track, and killed. In giving the case to the jury, the judge charged, among other things,

that, considering the nature of the defendants' business and the hazard attending the running of cars in the streets of the city, and particularly on a dark night, "they were bound to exercise the utmost care and diligence; and for the purpose of avoiding accidents, endangering property and life, were bound to use all the means and measures of precaution that the highest prudence could suggest, and which it was in their power to employ." Language stronger than this can hardly be employed to indicate the extreme degree of care which is to be exacted of railroad companies under circumstances where prudence and watchfulness are required. This charge was excepted to, but on an appeal to this court it was sustained. In giving the opinion of the court, Judge Denio remarks that, in his judgment, the charge did not overstate the obligations which attach to persons running cars in the night over a course which is also a public street, in requiring them to exercise the utmost care and vigilance, and to use all the means of precaution which the highest prudence could suggest.

Applying the principles of these cases to the one at bar, I think the charge of the judge in respect to the care which the defendants in this action were bound to exercise, was entirely unexceptionable. It was only expressing in somewhat different language, and applied to a state of facts somewhat variant in their circumstantial details, but essentially identical with the cases above cited, the rule that the degree of care which is required of persons situated like the defendants in this case was to be proportioned to the danger to be apprehended of inflicting injury upon others, and that care the jury have found was not exercised in this case.

The remaining question in this case arises upon the exception of the defendants to the charge and refusal to charge on the subject of the alleged negligence of the plaintiff. The fact, as disclosed by the evidence, appeared to be that the fire was communicated by sparks or coals driven from the engine into the building of the plaintiff through a partly open door, and it was insisted by the defendants, and the judge was asked to charge that, if the fire was thus communicated, the leaving open the door was an act of carelessness which would preclude a recovery. This instruction the judge declined to give, but did charge that the plaintiff was bound to use such care in protecting his premises as a man of ordinary prudence would have employed under the circumstances, and if through his

neglect, or that of his employees, his house was consumed, or if such neglect on his part concurred with negligence on the part of the defendants in producing the result, the plaintiff could not recover. Whether leaving open the door constituted such negligence, was left as a question of fact to be determined by the jury.

This portion of the charge is, in my judgment, wholly unexceptionable. It presented the legal principle, which prevails in such cases, clearly to the jury, and in a manner entirely favorable to the defendant, and left, as it should, the question of fact to them, upon the evidence. It surely was not the duty of the court to rule, as matter of law, that there was actual negligence on the part of the plaintiff, to such a degree as to bar his recovery. It is difficult to maintain the proposition than one can be guilty of negligence while in the lawful use of his own property upon his own premises. The principle contended for by the defendants' counsel, if carried to its logical conclusion, would forbid the erection of any buildings whatever upon premises in such proximity to a railroad track as would expose them to the possibility of danger from that quarter. The rights of persons to the use and enjoyment of their property are held by no such tenure as this. On the contrary, where one in the lawful use of his own property exposes it to accidental injury from the acts of others, he does not thereby lose his remedy for an injury occasioned by the culpable negligence of such other parties. This is the principle upon which a recovery was had in the case of *Cook v. Champlain Transportation Co.*, 1 Denio, 91, and the remarks of Judge Beardsley in that case are peculiarly apposite to this. The plaintiffs in that case were on their own land, and free to use it in any manner and for any purpose which was lawful. "It would be a startling proposition, indeed," he says, "that a building placed in an exposed position on one's own land is beyond the protection of the laws, and yet it would come to that result upon the argument in this case. There must be some wrongful act or culpable negligence on the part of the plaintiff, to bar him on this principle, and neither can be affirmed of any one for simply occupying a position of more or less exposure on his own premises."

The leaving open the door in this case, even if the act could be charged directly or mediately upon the plaintiff, surely cannot be characterized as a wrongful act or a culpable negligence. It is very possible that, by unusual precaution and

watchfulness on the part of the plaintiff, the consequences of the defendants' wrong might have been less disastrous; yet if he was guilty of no culpable negligence, the mere fact that he might have been more vigilant will not excuse the wrongful act of the defendants, nor deprive the plaintiff of all redress for the injury he has suffered. But, in truth, I am unable to see that the plaintiff was chargeable with any duty in respect to the closing of the door, even if it should be held that the omission to do this was an act of negligence. The plaintiff was not in the actual occupation of that part of the house which was fired from the engine. It was in the course of construction, and in an unfinished state, and the witness whose attention was directed to the door and the possible exposure from the sparks, and who partly closed it, was a mason engaged in other work upon another part of the building, and was only casually, and for a temporary purpose, in the room where the fire originated. He was not the servant of the plaintiff in any such sense as to make the latter responsible for his acts or omissions. Even conceding, for the sake of the argument, that they partook of the character of culpable omissions of duty, the case does not show whether this person was in the employment of the plaintiff and under a direct engagement with him, or was the subordinate of some other party who, as contractor, had charge of and was responsible for the entire work. At any rate, neither his employment nor his duty charged him with any responsibility in regard to closing the door, or any other act of precaution, if any such can be assumed to be devolved upon the plaintiff or his employees in respect to the protection of the property. If the witness might have been more prudent, or was even negligent, in not more effectually closing and leaving the door so as to prevent the entrance of sparks into the building itself, it by no means follows that this act would have obviated the effects of the defendants' carelessness, and still less that the plaintiff was chargeable with knowledge of the danger to which the building was exposed, and guilty of such negligence in not protecting it as to preclude any recovery for the total destruction of the property.

Upon the whole, I think the case was fairly submitted to the jury, under proper instructions in regard to the principles of law presented by the evidence, and that the verdict should not be disturbed. If these views are concurred in, the judgment must be affirmed.

All the judges concurred.

Judgment affirmed.

RAILROAD COMPANY IS REQUIRED TO USE GREATER DEGREE OF CARE IN RUNNING ITS TRAINS THROUGH CITIES AND VILLAGES than in the open country: *Zimmer v. New York Central etc. R. R.*, 7 Hun, 534; *Longabaugh v. Virginia City etc. R. R.*, 9 Nev. 295; and this rule concedes that the company would be liable in not exercising it, when by so doing, ordinary prudence on the part of a way-traveler would save him from injury: *Beisiagel v. New York Central R. R.*, 34 N. Y. 628. The amount of care demanded of those who run cars through the streets of a city is the utmost care: *Kinney v. Crocker*, 18 Wis. 81; and see *Gagg v. Vetter*, 41 Ind. 242. The principal case is cited to the foregoing points; and see *Johnson v. Hudson River R. R.*, 75 Id. 375.

RAILROAD COMPANY'S LIABILITY FOR FIRES CAUSED BY COALS OR SPARKS FROM LOCOMOTIVES: See *Burroughs v. Housatonic R. R.*, 38 Am. Dec. 64, and note considering the subject; *Hart v. Western R. R.*, 46 Id. 719; *Baltimore etc. R. R. v. Woodruff*, 59 Id. 72; *Sheldon v. Hudson River R. R.*, 67 Id. 155; and see *Gerke v. California Steam Nav. Co.*, 70 Id. 650. It is the duty of the company to use such precaution as might reasonably prevent damage to others: *Lackawanna etc. R. R. v. Doak*, 52 Pa. St. 381; and to use care in proportion to the danger; being a greater amount where property near its road, from its nature, is more likely to be destroyed: *Longabaugh v. Virginia City etc. R. R.*, 9 Nev. 295. So, in general, one who operates an engine in a populous part of a large and rapidly increasing city is bound to exercise a high degree of care and skill in its construction and management to prevent fires: *Gagg v. Vetter*, 41 Ind. 242; but the mere fact of an injury from fire by sparks emitted from a locomotive is not *prima facie* evidence of negligence: *Gandy v. Chicago etc. R. R.*, 30 Iowa, 422. The liability of an owner, in general, for fires caused thereby, turns upon actual negligence in its use, and not upon its being constructed in the form generally adopted, and used in the ordinary manner, with the usual precautions: *Hinds v. Barton*, 25 N. Y. 560. The principal case is an authority for the foregoing propositions; but see it distinguished, *per* Worden, J., dissenting, in *Pittsburgh etc. R. R. v. Noel*, 77 Ind. 123, in a case where a locomotive emitting sparks, and setting fire to the plaintiff's wood, was passing in the ordinary course of business, and not standing.

The owner of the property destroyed may be chargeable with contributory negligence: *Murphy v. Chicago etc. R'y*, 45 Wis. 230. He is bound to use such a degree of care as a man of ordinary prudence would have exercised under like circumstances: *Kansas Pacific R'y v. Brady*, 17 Kan. 389; *Collins v. New York Central etc. R. R.*, 5 Hun, 503; but he does not lose his right to compensation from the fact that his property was near the railroad track: *Grand Trunk R. R. v. Richardson*, 91 U. S. 473; and it is not negligence *per se* for him to stack his hay on a newly-mown meadow, thirty rods from the road: *St. Joseph etc. R. R. v. Chase*, 11 Kan. 56. So the question whether he was negligent in permitting dry stubble and grass to remain on his land, and in not having plowed a sufficient strip adjoining the railway to prevent the spread of fire, is one for the jury: *Kellogg v. Chicago etc. R'y*, 26 Wis. 235; *Snyder v. Pittsburgh etc. R'y*, 11 W. Va. 38. Property owners along the line of a railroad take the risk of injuries unavoidably produced by the use of fire for the purpose of generating steam, but the company cannot impose condi-

tions upon them to shield itself from its own negligence: *Burlington etc. R. R. v. Westover*, 4 Neb. 276. The principal case is cited to the foregoing points.

NEGLECTANCE, WHETHER QUESTION OF FACT OR OF LAW.—In the following cases, it was held to be a question of fact: *Beatty v. Gilmore*, 55 Am. Dec. 514; *Farish v. Reigle*, 62 Id. 666; *Galena etc. R. R. v. Yarwood*, 65 Id. 682; *Sawyer v. Eastern Steamboat Co.*, 74 Id. 463; and see the principal case cited to the point that, in an action for injuries caused through negligence, it is a question for the jury whether there was any contributory negligence on the part of the plaintiff, in *Collins v. N. Y. Cent. etc. R. R.*, 5 Hun, 503; *Murphy v. Chicago etc. R'y*, 45 Wis. 230; *St. Joseph etc. R. R. v. Chase*, 11 Kan. 56; *Kellogg v. Chicago etc. R'y*, 26 Wis. 235; *Snyder v. Pittsburgh etc. R'y*, 11 W. Va. 38. In the following cases, the question of negligence was held to be one of law: *Herring v. Wilmington etc. R. R.*, 51 Am. Dec. 395; *Railroad Co. v. Skinner*, 57 Id. 654; while in the following it was held to be a mixed question of fact and of law: *Trow v. Central R. R.*, 58 Id. 191; *Zemp v. Wilmington etc. R. R.*, 64 Id. 763; *Mad River etc. R. R. v. Barber*, 67 Id. 312; *Norris v. Litchfield*, 69 Id. 546.

THE PRINCIPAL CASE IS ALSO CITED IN *Loose v. Saratoga Paper Co.*, 42 How. Pr. 394, to the point that there must be proof of negligence to create a liability arising from the exercise of a conceded right; and quoted in *Rowell v. Railroad*, 57 N. H. 137, to the effect that it is difficult to maintain the proposition that one can be guilty of negligence while in the lawful use of his own property upon his own premises; and in *Ernst v. Hudson River R. R.*, 35 N. Y. 38; S. C., 32 How. Pr. 88; 3 Abb. Pr. 104; *Western Union Tel. Co. v. Byer*, 2 Col. 159, to the point that if a plaintiff, in an action for injuries through negligence, was himself guilty of no culpable negligence, the mere fact that he might have been more vigilant will not excuse the wrongful act of the defendant, nor deprive the plaintiff of all redress for the injury he has suffered. It is also cited in *Weber v. New York Central etc. R. R.*, 58 N. Y. 462, to the point that in some cases, and under some circumstances, ordinary care may demand a very high degree of vigilance and precaution, but this does not necessarily include all that is physically possible; and in *Cheney v. New York Central etc. R. R.*, 16 Hun, 421, to the point that the degree of care required of a person is governed by a regard for the time, place, and all other circumstances affecting the liability of third parties to receive injuries while in the exercise of reasonable care and prudence on their part.

KNEETTLE v. NEWCOMB.

[22 NEW YORK, 240.]

DEBTOR CANNOT, WHEN CONTRACTING DEBT, AGREE THAT EXEMPT PROPERTY MAY BE TAKEN ON EXECUTION, in case of non-payment.

APPEAL from a judgment in favor of the plaintiff, in an action for converting personal property. The defendant, Newcomb, had recovered a judgment against the plaintiff, a householder, who provided for a family, on notes which contained the following clause: "I hereby waive and relinquish all right

of exemption of any property I may have from execution on this debt." An execution was taken out and levied, against the plaintiff's consent, by the defendant, Brown, a deputy sheriff, upon certain household furniture, and glass-blower's tools used by the plaintiff in his trade, exempt from execution, and the property sold. The court held that the defendants were not warranted in seizing the exempt property of the plaintiff, and gave judgment in his favor.

Samuel Beardsley, for the appellants.

W. and L. J. Sanders, for the respondent.

By Court, DENIO, J. I am of opinion that a person contracting a debt cannot agree with the creditor that, in case of non-payment, he shall be entitled to levy his execution upon property exempt from levy by the general laws of the state. The statutes which allow a debtor, being a householder and having a family for which he provides, to retain, as against the legal remedies of his creditors, certain articles of prime necessity, to a limited amount, are based upon views of policy and humanity which would be frustrated if an agreement like that contained in these notes, entered into in connection with the principal contract, could be sustained. A few words contained in any note or obligation would operate to change the law between those parties, and so far disappoint the intentions of the legislature. If effect shall be given to such provisions, it is likely that they will be generally inserted in obligations for small demands, and in that way the policy of the law will be completely overthrown. Every honest man who contracts a debt expects to pay it, and believes he will be able to do so without having his property sold on execution. No one worthy to be trusted would, therefore, be apt to object to a clause subjecting all his property to levy on execution in case of non-payment. It was against the consequences of this over confidence, and the readiness of men to make contracts which may deprive them and their families of articles indispensable to their comfort, that the legislature has undertaken to interpose.

When a man's last cow is taken on an execution on a judgment rendered upon one of these notes, it is no sufficient answer to say that it was done pursuant to his consent freely given when he contracted the debt. The law was designed to protect him against his own improvidence in giving such consent. The statutes contain many examples of legislation based upon

the same motives. The laws against usury, those which forbid imprisonment for debt, and those which allow a redemption after the sale of land on execution, are of this class. So of the principle originally introduced by courts of equity, and which has been long established in all courts, to the effect that, if one convey land as security for a debt, and agree that his deed shall become absolute if payment is not made by the day, he shall still be entitled to redeem on paying the debt and interest; and so also with executory contracts without consideration to make gifts and the like. In these cases, the law seeks to mitigate the consequence of men's thoughtlessness and improvidence; and it does not, I think, allow its policy to be evaded by any language which may be inserted in the contract. It is not always equally careful to shield persons from those acts which, instead of being promissory in their character and prospective in their operation, take effect immediately. One may turn out his last cow on execution, or may release an equity of redemption, and he will be bound by the act. In thus discriminating, the law takes notice of the readiness with which sanguine and incautious men will make improvident contracts which look to the future for their consummation, when if the results were to be presently realized, they would not enter into them at all. If, with the consequences immediately before them, they will do the act, they will not generally be allowed to retract; it being supposed, in such cases, that valid reasons for the transaction may have existed, and that at all events, the party was not under the influence of the illusion which distance of time creates. Ordinarily, men are held to their executory as well as their executed contracts; but in a few exceptional cases, where the temptation is great, or the consequences peculiarly inconvenient, parties are not allowed to make valid prospective agreements. The present is, in my opinion, one of those cases. Before the passage of the exemption laws, contracts for the payment of money at a future time involved the consequence that all the debtor's property, without exception, might be taken on the execution in case of default. By the statutes exempting certain property, the legislature in effect determined that it was inexpedient to allow contracts entailing such results; and this was done by providing that certain property of limited value should not be taken. Parties cannot now stipulate that their contracts shall have the same effect as under the former law, for that would be hostile to the policy thus established.

There is another consideration belonging to the subject, which should be referred to. These exemption laws apply only to householders who have families for which they provide. It is a fair inference from this feature that one object of the legislature was to promote the comfort of families, and to protect them against the improvidence of their head. This was so considered by the supreme court in *Woodward v. Murray*, 18 Johns. 400. "I think it clear," said Judge Platt, "that the legislature meant to confer this privilege on each of those little primary communities called families." Again: "It was designed as a protection for poor and destitute families; and the forlorn and destitute condition of his family, in the absence of the husband and father, gave them a peculiar claim to the benefit of the statute." Some articles are now exempt which do not enter into the common use of the family as such; but it was supposed that the protection of the team and the implements of a man's trade would be likely to enable him to keep his family together, and to preserve the domestic establishment from want and dispersion. Assuming this to be within the policy of the enactments, it is obvious that a contract like the one contained in these notes is subversive of it, and consequently illegal and void.

The maxim, *Modus et conventio vincunt legem*, is not of universal application. It applies only to agreements in themselves legal. Where no rule of law or principle of public policy is concerned, the parties may, by contract, make a law for themselves. One object of municipal law is to promote the general welfare of society. The exemption laws seek to accomplish this, by taking from the head of a family the power to deprive it of certain property by contracting debts which shall enable the creditors to take such property on execution. The parties to this contract sought to set aside those laws, so far as this debt was concerned. This they could not do.

The contract, if held valid, would change the effect of the legal instrumentalities which the law has provided for the collection of debts. Executions upon judgments for debts authorize the seizing of all the debtor's property, except the articles specially exempted. These, the officer is forbidden to take, unless the debt was contracted in the purchase of property which was itself exempt from execution: Laws 1842, c. 157. I do not think it is within the power of parties, by their contracts, to give any other effect to judgments and executions than that which the law attributes to them. Could a person,

when contracting a debt, agree, for instance, that the act abolishing imprisonment for debt should not apply to any judgment which should be recovered on that contract, or that on such judgment there should be no right in the debtor to redeem any land that might be sold under the execution, or that he should not be discharged under any insolvent act? Clearly, this could not be done; and upon the same principle, I think the debtor could not, when contracting the debt, agree that exempt property might be taken on the execution. The law does not permit its process to be used to accomplish ends which its policy forbids, though the parties may, by a prospective contract, agree to such use.

The same precise question involved in this case came before the supreme court in *Crawford v. Lockwood*, 9 How. Pr. 547; and the court came to the same conclusion which I have reached: See also *Harper v. Leal*, 10 Id. 282.

For these reasons, I am of the opinion that the judgment of the supreme court ought to be affirmed.

All the judges concurred; SELDEN, J., for the reasons stated by him in *Crawford v. Lockwood*, *supra*.

Judgment affirmed.

EXEMPTION FROM EXECUTION, WHETHER MAY BE WAIVED BY CONTRACT: See *Bowman v. Smiley*, 72 Am. Dec. 738, and note discussing the subject; *Garrett & Martin's Appeal*, Id. 779. The principal case is cited to the point that the right to exemption is one which the debtor cannot waive by contract, in *Meloney v. Newton*, 85 Ind. 566; *Phelps v. Phelps*, 72 Ill. 549; *Shapley v. Abbot*, 42 N. Y. 451; *Becker v. Becker*, 47 Barb. 501.

THE PRINCIPAL CASE IS CITED IN *Phyfe v. Eimer*, 45 N. Y. 104, to the point that a party of full age, and *sui juris*, can waive a statutory or even a constitutional provision in his own favor, affecting simply his property or alienable rights, and not involving considerations of public policy; in *Cox v. New York Central etc. R. R.*, 63 Id. 421, to the point that the maxim, *Modus et conventio vincunt legem*, is subject to the restriction that the court will not enforce an agreement of parties contrary to express statute, or in contravention of public policy; and see *Kimpton v. Bronson*, 45 Barb. 632; and in *Becker v. Becker*, 47 Id. 499, 500, to the point that the statute creating exemption from execution is to be construed favorably towards the debtor. It is also cited in *Wilcox v. Hawley*, 31 N. Y. 654, as stating correctly the object and intent of the statutory exemption of property; and referred to in *Commercial Nat. Bank v. Chicago etc. R'y*, 45 Wis. 182, on the question of the reason for the exemption from execution of property of those who provide for the entire support of a family.

PEOPLE v. SAXTON.

[22 NEW YORK, 809.]

VOTER'S INTENTION IS TO BE INFERRED FROM REASONABLE CONSTRUCTION OF HIS ACTS, and is not to be ascertained by evidence of his mental purpose in depositing his ballot, or his notions of the legal effect of what it contained or omitted.

VOTER'S WRITING NAME ON BALLOT, IN CONNECTION WITH TITLE OF OFFICE, IS SUFFICIENT DESIGNATION of the name for that office, although he omits to strike out a name printed on it in connection with the same office. The writing is to prevail as the highest evidence of his intention.

APPEAL from a judgment on a verdict in favor of the defendant, Silas Saxton, in an action in the nature of a *quo warranto*, to determine his right to the office of county clerk for Ulster county. The defendant, by a certificate of the county canvassers, had been declared elected, at the general election in November, 1858. Besides the defendant, Solomon S. Hommell and Cornelius Burhans were candidates for the office of county clerk. Six ballots had been rejected by the inspectors of election, because they each contained two names. Two of these ballots had the name "Solomon S. Hommell," and one "Cornelius Burhans," printed on them, with "Silas" written before, and "Saxton" after the names, so as to read "Silas Solomon S. Hommell Saxton" and "Silas Cornelius Burhans Saxton." The printed name was not erased from two of these ballots at all, and on the other the only obliteration was that the name "Silas" was partially written over the word "Solomon." A voter, who had cast one of these ballots, testified that it was his intention to vote for Saxton. This evidence was admitted without objection, but the plaintiff moved to strike it out, which motion was overruled. The jury were charged that the inspector's decision that there were two names on each of the ballots was not conclusive; that it was for the jury to determine whether one or two names were designated; and that if the jury found that any or all of the ballots had but one name, it was proper for them to find, from the evidence, whether any or all of the ballots were intended for the defendant, and if such was the intention, to allow him the ballots. The verdict was for the defendant.

Lyman Tremain, for the appellants.

E. Cooke, for the respondent.

THE COURT. The intention of the voter is to be inferred, not from evidence given by him of the mental purpose with which

he deposited his ballot, or his notions of the legal effect of what it contained or omitted, but by a reasonable construction of his acts. His writing a name upon a ballot in connection with the title of an office, is such a designation of the name for that office as to satisfy the statute, although he omits to strike out a name printed upon it in connection with the same office. The writing is to prevail as the highest evidence of his intention. The judge ought to have charged the jury, as a matter of law, that they were bound to find the fact accordingly from the face of the ballot itself. The jury in this case having found in accordance with what would have been a proper direction, the verdict must stand.

All the judges concurred.

Judgment affirmed.

VOTER'S INTENTION IS TO BE INFERRED FROM HIS ACTS: *City of Columbus v. Dahn*, 36 Ind. 335; but it is only his intention, as expressed by his ballot, which can be taken into consideration: *People ex rel. Smith v. Pease*, 27 N. Y. 84, *per* Denio, J., dissenting. The paper ballot is to prevail as the highest evidence of his intention: *City of Beardstown v. City of Virginia*, 76 Ill. 49. The principal case is cited to the foregoing propositions. See, in this connection, *People ex rel. Lake v. Higgins*, 61 Am. Dec. 491; and see also *Shaw v. Stine*, 8 Bosw. 161, in which the principal case is cited as recognising the rule that the intentions of the parties must be gathered from the attending circumstances of the occasion.

CERTIFICATE OF ELECTION IS ONLY PRIMA FACIE EVIDENCE OF RESULT: *Rust v. Gott*, 18 Am. Dec. 497; *People v. Van Cleve*, 53 Id. 69; *People v. Cook*, 59 Id. 451; *Louisville etc. R. R. v. County Court of Davidson*, 62 Id. 424; *Pretzman v. Supervisors of Tazewell Co.*, 71 Id. 230. The principal case is cited in *People ex rel. Gregory v. Love*, 63 Barb. 545, to the point that the decision of the inspectors of election rejecting a ballot as designating the names of two persons is not conclusive, but upon *quo warranto* the question as to the voter's intention is open to inquiry.

GARDNER v. OGDEN.

[22 NEW YORK, 327.]

SUPREME COURT OF NEW YORK SUCCEEDED TO JURISDICTION OF COURT OF CHANCERY, under the constitution of 1846.

COURT OF EQUITY HAS POWER TO COMPEL CONVEYANCE OF LANDS IN ANOTHER STATE by a party over whose person it has jurisdiction; and this, although it is provided by statute that actions for the recovery of real property must be tried in the county in which the subject of the action is situated.

CAUSE OF ACTION BY PRINCIPAL AGAINST AGENT FOR FRAUDULENTLY SELLING LAND CANNOT BE UNITED, it seems, under section 167 of the New

York code of procedure, with a cause of action against the purchaser, as a trustee, for a reconveyance or an accounting.

CLERK OF AGENT TO SELL LANDS, WHO IS EMPLOYED OR CONCERNED IN AFFAIRS OF SELLER relating to the lands, is, alike with his principal, prohibited from purchasing, and if he does so, the seller may compel him to reconvey the lands, or account for their proceeds.

APPEAL by the plaintiff from an order of the general term of the supreme court granting a new trial, on appeal by the defendants from a judgment of special term against them. The plaintiff, who resided in New York, and his sister, Mrs. Hall, owned block 1, Carpenter's addition, in Chicago, and lots 4 and 5 in block 17. The firm of Ogden, Jones, & Co., real estate agents at Chicago, were employed to manage and sell this property, and in 1852 made partition between the plaintiff and his sister, the defendant Ogden valuing each share at five thousand five hundred and sixty dollars. The defendant Henry Smith and one Franklin Hathaway were clerks of Ogden, Jones, & Co. from 1852 to July 12, 1854. After some correspondence between the plaintiff and Ogden, Jones, & Co. in regard to the value of the lots, Hathaway, on October 28, 1853, wrote a letter to the plaintiff, in the name of the firm, saying: "We have now to report an offer made by Mr. Henry Smith for your lots, as follows: He proposes to give you seven thousand five hundred dollars, payable at the end of five or six years. If the offer is accepted, we will at once prepare the necessary papers, and see that the surety is ample. We doubt whether a better offer than this can now be obtained, as it is larger than the price paid for Mrs. Heartt's block 3, in same addition." The plaintiff replied: "The sale will do. I sell, as I am far off, and give the buyer a good bargain." Other correspondence in regard to the deed and securities took place between the plaintiff and Hathaway, who used the firm's name; and finally, on May 22, 1854, a note signed by Smith and Hathaway, and a mortgage executed by Smith and wife, were sent to the plaintiff, who acknowledged that they, "by the note and mortgage received by me yesterday, appear to be joint purchasers of my lots in Mr. Smith's name." On March 24 and 25, 1854, Smith sold portions of the lots for eight thousand two hundred and fifty dollars, and on May 3d sold another portion for one thousand dollars. On June 12, 1854, the plaintiff notified Ogden, Jones, & Co. of his dissatisfaction with and dissent from the sale. Ogden was absent in Europe during all the time the negotiations with

Smith for the sale of the plaintiff's lands were carried on. The plaintiff charged Ogden with fraud in having made a sale of the lands for less than their actual value, and claimed that Ogden was interested in the purchase. He asked that the deed to Smith be set aside, and that Smith be compelled to reconvey, or that Smith and Ogden should pay the highest price which the land had attained. The plaintiff had judgment in his favor. The defendants appealed, and the supreme court, at general term, reversed the judgment, and ordered a new trial. From this order, the plaintiff appealed, and stipulated that if the order should be affirmed, judgment might be entered against him.

William Curtis Noyes, for the appellant.

John H. Reynolds, for the respondents.

By Court, DAVIES, J. The first question necessary to be considered is, whether the supreme court had jurisdiction of the subject-matter of this action. That court, under the reorganization of the judicial system of this state under the constitution of 1846, succeeded to all the powers of the court of chancery, and to all the jurisdiction which it possessed and was accustomed to exercise. This question caused embarrassment to the special term in this case; and it seemed to doubt its power to order in direct terms the defendants, or either of them, to reconvey the premises deeded by the plaintiff to Smith, on the ground that the court had no jurisdiction, for the reason that the lands, the subject-matter of the action, were situated without the boundaries of the state. The supreme court, at general term, in its opinion, says: "If the sale to Smith could be avoided on the ground of the relation in which he stood to Ogden, Jones, & Co., the action for that purpose should have been prosecuted against Smith alone, and before some tribunal having cognizance of the subject-matter of the action. The premises, being in another state, an action for their recovery cannot be successfully prosecuted in this court. In this view of the authority of the supreme court to entertain this action, we think the learned courts below fell into a grave error. It is true that, by section 123 of the code, actions for the recovery of real property must be tried in the county in which the subject of the action is situated. The supreme court of this state, as a court of equity, could not, therefore, take jurisdiction of an action for the recovery of lands situated in another state, where the proceed-

ing was *in rem*; but where it has jurisdiction of the proper parties, it may, by its judgment or decree, compel them to do equity in relation to lands located without its jurisdiction. The court, in such a case, acts *in personam*. We regard this as so well settled by authority that it cannot longer be seriously questioned. A review of the authorities in England and this country will, we think, place this matter beyond all doubt. In *Archer and Preston*, 1 Eq. Cas. Abr. 133, in which case, if in any, the jurisdiction was local, the matter there being, not only for land that lay in Ireland, but of a title under the act of settlement there, yet the defendant coming into England, a bill was exhibited against him there, and a *ne exeat regno* granted, and he put to answer a contract made for those lands.

This case is cited by Lord Chancellor Nottingham in *Arglasse v. Muschamp*, 1 Vern. 75, and by Lord-Keeper North in S. C., Id. 135. *Arglasse v. Muschamp*, *supra*, was a case in which the plaintiff exhibited his bill to be relieved against an annuity or rent-charge made upon lands in Ireland on the ground that the same was obtained by fraud. The defendant pleaded to the jurisdiction of the court that, the lands lying in Ireland, the matter was properly examinable in the court of chancery there, and that that court in England ought not to interpose. The lord chancellor said: "This is surely only a jest put upon the jurisdiction of this court by the common lawyers; for when you go about to bind the lands and grant a sequestration to execute a decree, then they readily tell you that the authority of this court is only to regulate a man's conscience, and ought not to affect the estate, but that this court must *agere in personam* only; and when, as in this case, you prosecute the person for a fraud, they tell you you must not intermeddle here because the fraud, though committed here, concerns lands that lie in Ireland, which makes the jurisdiction local, and so would wholly elude the jurisdiction of this court. "But," he adds, "they certainly forget the case of *Archer and Preston*, *supra*;" and the plea was overruled, and the defendant ordered to pay costs for endeavoring to oust the court of its jurisdiction. This was in Michaelmas term, 1682. Lord Nottingham died in December of that year, and was succeeded by Lord Chief Justice North as lord-keeper. In the succeeding term (Hilary, 1682), a petition was presented to the lord-keeper by the defendant for a rehearing of his plea to the jurisdiction of the court; but it was not allowed; the

lord-keeper citing only *Archer and Preston's Case*, 1 Eq. Cas. Abr. 133. In the case of *Earl of Kildare v. Eustace*, 1 Vern. 404, the plaintiff's bill was to be relieved touching the trust of certain lands in Ireland. The defendants had appeared, and had not objected to the jurisdiction of the court; and the case coming on to be heard, the lord chancellor, Jeffries, in Michaelmas term, 1686, objected that the court could not hold pleas of lands in Ireland. The plaintiff's counsel insisted that he was entitled to relief in that court by reason that both plaintiff and defendant were there in England, and that a court of equity does only *agere in personam*; and the counsel instanced the precedents of *Arglasse v. Muschamp*, 1 Vern. 75, and *Ardglasse v. Pitt*, 1 Id. 238, and Archer's case, and insisted there would be a failure of justice if the action was not sustained. But the lord chancellor overruled the plaintiff's counsel, and said, in the cases of Lord Arglasse, the fraudulent contracts were made here in England, and thereupon pronounced a rule for dismissing the bill, but upon the importunity of the plaintiff's counsel, gave them a week's time to search for precedents.

The same case again came up on the third of December following, when the lord chancellor and the judges then attended with precedents, and Sir John Holt argued for the plaintiff the preliminary point only, to wit, whether the court had jurisdiction and might hold pleas of the land which lay in Ireland. The defendant's counsel in a manner waived the preliminary point, and would not enter into the debate whether the court might not decree the trust of lands in Ireland, the trustee living here. After a long debate, the judges, concurring with his lordship that the court had a proper jurisdiction in that case, made a decree for the plaintiffs. *Toller v. Carteret*, 2 Vern. 494, was heard before Lord-Keeper Cowper, in May, 1705. The defendant Carteret was the owner of the Isle of Sarke, and made a mortgage thereon to one Willows, the plaintiff's intestate, for five hundred years, for five hundred pounds. A bill was filed in the court of chancery in England that the defendant might redeem or be foreclosed. The defendant pleaded to the jurisdiction of the court, that the island of Sarke was part of the Duchy of Normandy, and had laws of their own, and was under the jurisdiction of the courts of Guernsey, and not within the jurisdiction of the court of chancery. The lord-keeper overruled the plea, because the grant was of the whole island, and secondly, that the court of chancery had also jurisdiction, the defendant being served

with the process here, *et æquitas agit in personam*. The case of *Penn v. Lord Baltimore*, 1 Ves. sen. 444, is worthy of attentive consideration. This was a bill filed in chancery for a specific performance of articles settling the boundaries of the colonies of Maryland and Pennsylvania, made and executed between the respective proprietors thereof. Two objections to the jurisdiction of the court were taken: 1. That the court had not, and ought not to take, jurisdiction, for that the same was in the king and council; 2. That the agreement ought not to be carried into execution by the court, as it affected the estates, rights, and privileges of the planters, etc., without the district, and the laws by which they live.

The case seems to have been ably argued and maturely considered; for Lord Hardwicke says, in the commencement of his opinion, that he had directed the cause to stand over for judgment, not so much from any doubt of what was the justice of the case, as by reason of the nature of it, its great consequence and importance, and the great labor and ability on both sides; it being for the determination of the right and boundaries of two great provincial governments and three counties—of a nature worthy of the judicature of a Roman senate, rather than of a single judge; and he says: “My consolation is, that if I should err in my judgment, there is a judicature, equal in dignity to the Roman senate, that will correct it.” He fully sustains the jurisdiction of the court of chancery, and at page 447, says: “The conscience of the party was bound by this agreement, and being within the jurisdiction of this court, which acts *in personam*, the court may properly decree it as an agreement, if a foundation for it.” In answer to the arguments that the court had no means to enforce its decree, he says: “If they could not at all, I agree it would be in vain to make a decree, and that the court cannot enforce their own decree *in rem* in the present case; but that is not an objection against making a decree in the cause, for the strict primary decree in this court, as a court of equity, is *in personam*. . . . In Lord King’s time, in the case of *Richardson v. Hamilton*, attorney-general of Pennsylvania, which was a suit of land and house in the town of Philadelphia, the court made a decree that it could not be enforced *in rem*. In the case of Lord Anglesey, of lands lying in Ireland, I decreed for distinguishing and settling the parts of the estate, though impossible to enforce that decree *in rem*; but the party being in England, I could enforce it by process of contempt *in personam* and se-

questration, which is the proper jurisdiction of the court." To the same point may be cited the cases of *Earl of Derby v. Duke of Athol*, 1 Ves. sen. 202; *Lord Cranstown v. Johnston*, 3 Ves. jun. 170; and *Lord Portarlington v. Soulby*, 3 Myl. & K. 104. The case of *Massie v. Watts*, 6 Cranch, 148, is quite in point. There, a bill was filed in the circuit court of Kentucky against the defendant, a citizen of Kentucky, to compel him to convey to the plaintiff lands in the state of Ohio, to which the defendants had obtained the legal title, the plaintiff claiming to be equitably entitled thereto. The circuit court sustained the bill, and made a decree that the plaintiff recover of the defendant, Massie, the lands claimed, and convey the same to him; and that, upon such conveyance being made, the plaintiff should assign to the defendant all his claim to another quantity of land mentioned in the decree. From this decree, an appeal was taken to the supreme court of the United States, and there affirmed. Marshall, C. J., in delivering the opinion, says: "Where the defendant in the action is liable to the plaintiff, either in consequence of contract or as trustee, or as the holder of a legal title acquired by any species of *mala fides* practiced on the plaintiff, the principles of equity give a court jurisdiction wherever the person may be found; and the circumstance that a question of title may be involved in the inquiry, and may even constitute the essential point on which the case depends, does not seem sufficient to arrest jurisdiction." He then reviews the English cases already adverted to, and concludes, on the point of jurisdiction, by saying that upon the authority of those cases and of others, which are to be found in the books, as well as upon general principles, the court was of opinion that, in case of fraud, of trust, or of contract, the jurisdiction of a court of chancery is sustainable wherever the person be found, although lands not within the jurisdiction of that court may be affected by the decree. In that case, the court held Massie to be the agent of O'Neal, the plaintiff's grantor, and to whose rights the plaintiff had succeeded, and that, having obtained a patent for land in his own name, which his duty required him to obtain for O'Neal, he must convey the land covered thereby to the plaintiff. The court say: "According to the clearest and best established principles of equity, the agent who so acts becomes a trustee for his principal. He cannot hold the land under an entry for himself, otherwise than as trustee for his principal."

In *McDowell v. Read*, 3 La. Ann. 391, the supreme court of

that state held that, when a court is called upon to enforce a right, it may avail itself of its jurisdiction over the person to do justice relative to a subject-matter beyond its jurisdiction, though lands be affected by the decree. The case of *Mussina v. Alling*, 11 Id. 568, has been cited as holding a contrary doctrine. I think the leading opinion in this case, upon this point, proceeds upon the assumption that the courts of that state do not possess the chancery powers vested in the court of chancery in England. The judge who delivered the opinion in that case says that the people of Louisiana have always resisted the foreign modes of procedure, and especially the peculiar doctrines and forms of chancery; that, although the courts of that state have equity and common-law jurisdiction, it does not follow that all the prerogatives claimed by courts of common law and courts of chancery, and all their artificial rules and peculiar dogmas, should be usurped by the courts of Louisiana. The learned judge seemed to think that if a contrary doctrine were adopted, the courts of New Orleans might be occupied "with investigation of land titles all round the world." In *Farley v. Shippen*, 1 Wythe, 254, the court of chancery in Virginia held that it had jurisdiction to enforce a trust in relation to lands lying in North Carolina, the defendants being amenable to its process. To the same effect is the case of *Guerrant v. Fowler*, 1 Hen. & M. 5; so, also, *Hughes v. Hall*, 5 Munf. 431.

The current of decision in this state, upholding the jurisdiction of our courts upon this question, has been uniform. I am unable to find that any of the learned judges of our courts, who have examined the question and expressed an opinion upon it, have given it hesitatingly or doubtfully, except in the present case. I think all the cases in the state speak a uniform language, and give out no uncertain sound. The earliest case is that of *Dale v. Roosevelt*, 5 Johns. Ch. 174, where Chancellor Kent, in 1821, granted an injunction to restrain any suit upon an agreement relating to lands in the state of Ohio. The jurisdiction of the court was distinctly affirmed by Chancellor Sanford, in *Ward v. Arredondo*, Hopk. 213. In that case, the land was in the state of Florida, and the parties in this state; and the bill was filed to cancel a deed and restrain an agent of the grantor from parting with it. I am unaware that the authority of this case has ever been questioned in this state; on the contrary, it has been frequently affirmed: *Mead v. Merritt*, 2 Paige, 402; *Mitchell v. Bunch*, Id. 606 [22 Am.

Dec. 669]; *Sulphen v. Fowler*, 9 Id. 280; *Shattuck v. Cassidy*, 3 Edw. Ch. 152; *De Klyn v. Watkins*, 3 Sandf. Ch. 185; *Newton v. Bronson*, 13 N. Y. 587 [67 Am. Dec. 89]. In this last case, this court says that the doctrine established is, that the court of chancery, having jurisdiction of the person of the defendant, will, by its process of injunction and attachment, compel him to do justice by the execution of such conveyances and assurances as will affect the title of the property in the jurisdiction in which it is situated. This court also held, in that case, that the present supreme court possesses the jurisdiction formerly exercised by the court of chancery. It also disposes of the application of section 123 of the code to a case like that under consideration. As sustaining the same general doctrine of all these cases, I will only refer to an additional case—that of *D'Ivernois v. Leavitt*, 23 Barb. 63.

These cases must be held to establish the jurisdiction of the supreme court, in the present case, on an impregnable basis, and that the court, having jurisdiction of the party in whom the legal title to the land in controversy is vested, may, by its process of attachment and injunction, compel him to do justice by the execution of such conveyances and assurances as will affect the title to them in the state of Illinois.

It is appropriate here to examine into the nature and character of the complaint in this action, and the grounds upon which it is sought to make the respective defendants liable. The defendant Ogden is charged with a fraud in having made sale, by himself or his partners, of the plaintiff's lands, at a price far below their actual value, and when they knew that they were selling in an advancing market; that the firm, including Ogden, was interested in the purchase by Smith and Hathaway, their clerks, and that the sale was made to them to defraud the plaintiff; and the plaintiff claims to recover of Ogden the highest price which the land has attained, by reason of his fraudulent disposition of it. The plaintiff's ground of claim against Smith is, that he stood in such relation of confidence to the plaintiff that, in making the purchase, the law adjudges that he holds the subject-matter of it as the plaintiff's trustee, and that the plaintiff can call him to account as such. This the plaintiff can do, if such relation of confidence subsists, by requiring a reconveyance of the property, if that be practicable, with an account and payment of the rents and profits accruing during the time it was held by the trustee, or if that is not practicable, by calling on the trustee to account and pay

over to his *cestui que trust* all that he has realized, or ought, by due diligence to have realized, from the trust estate. In the present case, the plaintiff has elected to regard Smith as his trustee; and his complaint as to him, and the decree of the special term proceeds on this basis. The plaintiff, therefore, elects to affirm the sale made to Smith. He cannot, *uno flatu*, affirm it as to him, and disaffirm it as to the defendant Ogden. It is difficult to see how, under the provisions of section 167 of the code, these causes of action may be united in the same complaint. Although it may be said that both causes of action arise out of the same transaction, to wit, the sale of the plaintiff's lands to the defendant Smith, yet the cause of action against Ogden is for an injury to the plaintiff's property, while that against Smith is a claim against him as a trustee by operation of law. The causes of action joined in this complaint do not affect both of the parties defendant. Ogden is not affected by, or in any way responsible for, Smith's acts as the plaintiff's trustee, and the complaint does not profess to make him liable therefor. So Smith is not sought to be made responsible for the fraudulent acts of Ogden. On the plaintiff's own showing, he has separate and distinct causes of action against each of the defendants, and which cannot be joined under the code. The issues are separate; the relief prayed against each is distinct and different; and the proofs relied on to maintain each issue are of an entirely dissimilar character.

We have looked into the testimony in the case to ascertain if the charge of fraud against the defendant Ogden is sustained by the testimony. As to any personal fraud, it is clear he was not guilty of any, for he was absent in Europe during all the time the negotiations of his firm with Smith, for the sale of the plaintiff's lands, were carried on, and did not return until about the time the complaint in this action was verified. The plaintiff entirely failed to show any fraud on the part of the firm or the defendant Ogden, of such a character as would make them responsible in damages for the sale of the lands to Smith. The testimony fully sustains the position that, at the time of the sale, the price paid, or agreed to be paid, was fair and adequate, and that the purchase-money was adequately secured, and it fails to show that Ogden's firm, or any member of it, had any interest in the purchase. The affirmation of the sale by the plaintiff is a complete answer to the claim for damages against the firm for fraud in making the

sale. In the case of *Massie v. Watts*, 6 Cranch, 148, one Anderson, who made the survey which, it was alleged, Massie had located in his own name instead of that of his principal, was made a party defendant, charging him with fraud in making the survey. On the hearing, the complaint was dismissed, with costs, as to Anderson, and a decree made against Massie, which was affirmed by the supreme court on appeal. A proper disposition of this cause, as to the defendant Ogden, would have been to have dismissed the complaint as to him. The supreme court, at general term, having reversed the judgment of the special term and granted a new trial, and the plaintiff having appealed therefrom, and stipulated that, if it should be affirmed, judgment absolute might be rendered against him, it is now proper to affirm that order as to the defendant Ogden, and render judgment absolute in his favor, by dismissing the complaint as to him, with costs.

It only remains now to consider the cause of action against the defendant Smith. It proceeds upon the ground that Smith stood in such relation of confidence to the plaintiff that the purchase made by him was made as the plaintiff's trustee, and that he can derive no benefit therefrom. This leads to an examination of the main and important question in the case. It is to be observed in the commencement that Ogden, Jones, & Co. were the conceded agents of the plaintiff; as such, they owed a duty to him to manage and dispose of his property to the best advantage. It is admitted by the answer that Hathaway and the defendant Smith were clerks of the firm during the years 1852, 1853, and up to July 12, 1854. As such, they of course had access to the correspondence of the firm, were well acquainted with the plaintiff's urgency to sell, his motives for so doing, and all the facts and circumstances connected with the property known to the plaintiff's agents; and as the clerks of the firm, they owed the same duty to the plaintiff. This view is much strengthened by the circumstance that all the correspondence with the plaintiff relating to the sale was carried on by Hathaway in the name of the firm; though, in the important letter of October 26, 1853, his name does not appear as the writer. It was written, apparently, by the firm, and signed in their name. A circumstance is disclosed in the proof, which tends strongly to the inference that Hathaway was either interested in this purchase from the beginning or intended so to be. I am strongly impressed with the conviction that he was originally a party in interest. It appears that

the plaintiff and his sister, Mrs. Hall, were the owners jointly of block No. 1, Carpenter's addition, in Chicago, and of lots 4 and 5 in block 17; that the firm of Ogden, Jones, & Co. had charge of this property, and in the spring of 1852, they made partition thereof between Mrs. Hall and the plaintiff, valuing each share at five thousand five hundred and sixty dollars. Hathaway, in the letter of January 13, 1854, informs the plaintiff that he had become the owner of Mrs. Hall's lots; and this circumstance presents a motive on his part to become the owner of, or interested in, the share of the lots owned by the plaintiff. In addition to this, he became equally bound with Smith, for the payment of the purchase-money, and this, coupled with the conceded fact that he is now interested with him, leads to the inevitable conclusion that he was so originally, or, at least, intended to be. If Ogden, Jones, & Co. had become the purchasers, instead of their clerks Smith and Hathaway, what would have been the plaintiff's rights in the premises? The rule is clearly laid down by that learned and eminent writer, Lord St. Leonards, in his work on vendors and purchasers (see Sugden on Vendors, 13th ed., 566); he says: "It may be laid down as a general proposition that trustees, who have accepted the trust (unless they are nominally such, as trustees to preserve contingent remainders), agents, commissioners of bankrupts, assignees of bankrupts, or their partners in business, solicitors to the commission, auctioneers, creditors who have been consulted as to the mode of sale, counsel, or any persons who, being employed or concerned in the affairs of another, have acquired a knowledge of his property, are incapable of purchasing such property themselves, except under the restrictions which will shortly be mentioned. For, if persons having a confidential character were permitted to avail themselves of any knowledge acquired in that capacity, they might be induced to conceal their information, and not to exercise it for the benefit of the persons relying on their integrity. The characters are inconsistent. *Emptor emit quam minimo potest, venditor vendit quam maximo potest.*"

In *Fox v. Mackreth*, 2 Bro. C. C. 400, it was held by the master of the rolls (afterwards Lord Kenyon), and Lord Chancellor Thurlow, that a trustee for the sale of estates for the payment of debts, who purchased them himself by taking undue advantage of the confidence reposed in him by the plaintiff, and who resold the same premises at a greatly advanced price, should be regarded as a trustee, as to the sums produced

by such second sale, for the original owner. This decree was affirmed in the house of lords in March, 1791: *Mackreth v. Fox*, 4 Brown P. C. 258. Soon after this, Mackreth, the delinquent trustee, smarting under the just principles of law laid down by the courts, sought to avenge himself for the wrong which he imagined had been done to him, by challenging Sir John Scott, afterwards Lord Eldon, one of the leading counsel for Fox, the plaintiff. No notice was taken of this challenge by Sir John Scott: Twiss's Life of Lord Eldon, vol. 1, p. 218. And this case has ever remained as a leading authority, and one of peculiar interest.

In *Hall v. Noyes*, 3 Bro. C. C. 483, a bill was filed by a widow of a *cestui que trust*, ten years after the sale of trust property by three trustees to one, and the purchaser was held a trustee for the widow. And it is a fact to be noted that the price given by the trustee was more than could have been got from any one else.

In *Crowe v. Ballard*, 3 Bro. C. C. 117, the lord chancellor says: "Ballard undertakes to sell a legacy, and pretends he took great pains so to do; then he buys it himself. This is alone sufficient to set aside the transaction. It is impossible, at any rate, that the person employed to sell can be permitted to buy."

In *Whichcote v. Lawrence*, 3 Ves. 740, the lord chancellor says: "The real proposition, which is very plain in point of equity, and a principle of clear reasoning, is that he who undertakes to act for another in any matter, shall not in the same matter act for himself. Therefore, a trustee to sell shall not gain any advantage by being himself the person to buy."

This principle was acted on by Lord King, in *Keech v. Sanford*, Sel. Cas. Ch. 61, October 31, 1726. He there said: "It might seem hard that the trustee is the only person of all mankind who might not have the lease; but it is very proper that the rule precluding him from purchasing should be strictly pursued, and not in the least relaxed."

In *Whelpdale v. Cookson*, 1 Ves. sen. 8, Lord Chancellor Hardwicke would not allow a purchase by a trustee to stand, although another person, being the highest bidder, bought it for him at a public sale. He said that he knew the dangerous consequences of permitting it; and it was not enough for the trustee to say you cannot prove any fraud, as it is in his power to conceal it. The whole doctrine is very fully reviewed by Lord Eldon, chancellor, in *Ex parte James*, 8 Ves. 337.

It were useless to cite all the authorities in the books on this point. A few additional ones, as being of peculiar significance and importance, will be referred to. Notice particularly should be taken of the case of *York Buildings Association v. Mackenzie*. It first appeared in 8 Brown P. C. by Torn, in Appendix 42; but has since been reported in 3 Paton [4 Sc. App. Cas] 378. Chancellor Kent, in *Davous v. Fanning*, 2 Johns. Ch. 252, says of it that it is a case too important to be omitted. He says that it is a complete vindication of the doctrine he applied in that case, and that, considering the eminent character of the counsel who were concerned in that case, and who had since filled the highest judicial stations, and the ability and learning which they displayed in the discussion, it is, perhaps, one of the most interesting, on a mere technical rule of law, that is to be met with in the annals of our jurisprudence. He added that the reasons of the house of lords, for setting aside the sale, are not given, and that we are left to infer them from the arguments upon which the appeal was founded. They have now appeared in the report in 3 Paton. It is stated by the reporter, in a note (1 Macq. 481), that the argument of this case lasted sixteen days, at two sessions of parliament (1794 and 1795). Judgment was given on the seventeenth. Lord Loughborough was, indeed, chancellor then; but the tradition is that Lord Thurlow (who had recently delivered the opinion in *Fox v. Mackreth*, 2 Bro. C. C. 400), took the chief part in the hearing and deliberation. A person present at the time the judgment was pronounced, says, in a note to the reporter: "I have a very strong recollection of the very impressive speech of Lord Thurlow on the appeal of *York Buildings Company v. Mackenzie*. I was present. Lord Loughborough, the chancellor, spoke after Lord Thurlow." The appellants were an insolvent company, and their estate was sold by the order of the court of session, at a public judicial sale, to satisfy creditors.

The course at such sales is to set up the property at a value fixed upon by the court, which is called the upset price, and which is fixed on information obtained and communicated to the court by the common agent of the court, who has the management of all the outdoor business of the cause. The respondent in the case was the common agent, and he purchased for himself at the upset price; no person appearing to bid more, and the sale was confirmed by the court; and in the course of eleven years' possession he had expended large

sums for buildings and improvements. There was no question as to the fairness or integrity of the purchase. The object of the appellants was to set aside the sale, on the ground that the purchaser was the common agent in behalf of all parties to procure information and attend the sale, and stood in the nature of a trustee, and therefore disabled to purchase. On the part of the appellants, it was contended that the sale in question was, *ipso jure*, void and null, because the respondent, from his office of common agent, was under a disability and incapacity which precluded him from being a purchaser. "The office of common agent, in a ranking and sale, infers a natural disability, which, *ex vi termini*, imports the highest legal disability, because a law which flows from nature, being founded on the reason and nature of the thing, is paramount to all positive law; that it is of no moment what the particular name or description, whether of character or office, situation or position, is, on which the disability attaches. "Tutor, ait Paulus, rem pupilli emere non potest; idenque porrigendum est ad similia, id est, ad euratores, procuratores, et qui negotia aliena gerunt:" Lib. 3, sec. 7, ff. De Contrac. emp., etc. The reason of this law is implied in the nature of the cases to which it is extended. Its energy does not consist in a distinction of mere words that a tutor cannot be both seller and buyer, neither does it rest on another applicable enough adage, *Nemo potest in rem suam auctor esse*. This *sententia* of the Roman jurisconsult is, that the tutor cannot buy his pupil's estate, because he has a trust and charge for his pupil, and therefore it is that the law is extended *ad similia*, and to all, *qui negotia aliena gerunt*. By this principle, as the sound and substantial reason of the law, is to be interpreted that other text of the Pandects which says: "Item ipse tutor, et emptoris et venditoris officio fungi non potest:" Lib. 5, sec. 7, ff. De Auct. and Cons. Tut. and Cur. These views were not controverted by the counsel for the respondent; but they insisted that the sale could be maintained on other grounds. The opinions in the house of lords were given by lords Thurlow and Loughborough. The former said that all the gentlemen admit that it was the duty of the agent to carry on the sale to the utmost advantage for the benefit of the creditors and those interested in the residue; and taking it to be so, one side said, that being your situation, it is utterly impossible for you to perform that duty in such a manner as to derive an advantage to yourselves. He said, this seems to be a princi-

ple so exceedingly plain that it is, in its own nature, indisputable; for there can be no confidence placed unless men will do the duty they owe to their constituents, or be considered to be faithfully executing it. In these views, the chancellor concurred; and the sale was set aside. Lord Eldon and Sir W. Grant designate this as the great case, and frequently refer to it; and Lord St. Leonards, in his work on vendors and purchasers, vol. 3, p. 240, calls it likewise the great case, and frequently refers to it.

In *Jeffrey v. Aiken*, 4 Sess. Cas., 1st ser., 729 [*723], decided in Scotland in June, 1826, the lord ordinary observed, it is impossible to hold that the seller can also be the buyer of the subject, after the judgment of the house of lords in the case of *York Buildings Company v. Mackenzie*. In *Hughs v. Watson* [not reported], decided also in Scotland, January 20, 1846, the same rule as laid down in Mackenzie's case was reiterated and adhered to. Lord Jeffrey said: "The principle involved in this case is a very familiar and general one in our laws. No person can be actor *in rem suam*. The stringency of the maxim has been ruled and held settled by the house of lords in the case of Mackenzie. . . . It is now *presumptio juris et de jure*, that where a person stands in these inconsistent relations of both buyer and seller, there are dangers, and it is not relevant to say that it is impossible there could be any in the particular case. I should be sorry to think that any doubt was thrown on this rigorous principle, which has been established both here and in the other end of the island." The whole subject is elaborately reviewed in the case of the *Aberdeen R. R. Co. v. Blaikie Brothers*, 1 Macq. 461, decided in the House of Lords July 20, 1854. Lord Cranworth, in his opinion, says: "An agent has duties to discharge of a fiduciary character toward his principal; and it is a rule of universal application that no one having such duties to discharge shall be allowed to enter into engagements in which he has, or can have, a personal interest conflicting, or which possibly may conflict, with the interests of those whom he is bound to protect. So strictly is this principle adhered to that no question is allowed to be raised as to the fairness or unfairness of a contract so entered into. It obviously is, or may be, impossible to demonstrate how far in any particular case the terms of such a contract have been the best for the *cestui que trust* which it was possible to obtain. It may sometimes happen that the terms on which a trustee has dealt, or attempted to deal, with the estate or in-

terests of those for whom he is a trustee, have been as good as could have been obtained from any other person; they may even, at the time, have been better. But still, so inflexible is the rule, that no inquiry on that subject is permitted. The English authorities on this subject are numerous and uniform." In these views Lord Brougham concurred (p. 483). To the same point may be cited *Lewis v. Hillman*, 3 H. L. Cas. 607, 629, 630. In *In re Bloyes' Trust*, 1 Macn. & G. 488, at p. 495, the rule is declared clearly and emphatically.

The same line of decision in this state has been uniform, and the cases are numerous where it has been recognized, affirmed, and rigorously applied. It would appear to have been first enunciated in the supreme court in *Munro v. Allaire*, per Kent, J., in *Bergen v. Bennett*, 1 Cai. Cas. 19 [2 Am. Dec. 281]. It was distinctly recognized in that case as a sound and established rule: See pp. 19, 20. It received the unequivocal indorsement of the court of errors in *Munro v. Allaire*, 2 Cai. Cas. 183 [2 Am. Dec. 330]. Benson, J., in delivering the opinion of the court, says: "It is a principal that a trustee can never be a purchaser; and I assume it as not requiring proof that this principle must be admitted, not only as established by adjudication, but also as founded in indispensable necessity, to prevent that great inlet of fraud and those dangerous consequences which would ensue if trustees might themselves become purchasers, or if they were not in every respect kept within compass. Although it may, however, seem hard that the trustees should be the only persons of all mankind who may not purchase, yet, for the very obvious consequences, it is proper that the rule should be strictly pursued, and not in the least relaxed." Chancellor Kent, in *Davoue v. Fanning*, 2 Johns. Ch. 252, says that he cannot but notice the precision and accuracy with which the rule and the reason of it are here stated.

The next case in which this rule is affirmed is that of *Jackson v. Van Dalsen*, 5 Johns. 43, in the supreme court. The whole subject received a most elaborate and searching examination by Chancellor Kent, in *Davoue v. Fanning*, 2 Johns. Ch. 252. The authorities are fully and carefully reviewed, and the powers of his great mind and his varied learning were brought to bear upon this discussion. It is the great case in our courts on this subject, and it will bear a favorable comparison with any other examination of this question. It settled the rule for this state, and has been recognized and adopted as authority by many of the courts of the sister states.

In harmony with these views are the cases of *De Caters v. Le Ray de Chaumont*, 3 Paige, 178; *Slade v. Van Vechten*, 11 Id. 28; *Poillon v. Martin*, 1 Sandf. Ch. 569; *Jewett v. Miller*, 10 N. Y. 402 [61 Am. Dec. 751]; *Van Epps v. Van Epps*, 9 Paige, 237; *Torrey v. Bank of Orleans*, 9 Id. 649; S. C., 7 Hill, 260; *Hawley v. Cramer*, 4 Cow. 717; *Dobson v. Racey*, 8 N. Y. 216; *Moore v. Moore*, 5 Id. 256.

This subject was very elaborately discussed in the case of *Michoud v. Girod*, 4 How. 503. The very able opinion of Mr. Justice Wayne leaves nothing new to be said. It contains a reference to and review of the cases and text-writers bearing upon the question. Interesting cases on this question may also be found in *Beeson v. Beeson*, 9 Pa. St. 284; *Hill v. Frazier*, 22 Id. 320; *Rosenberger's Appeal*, 26 Id. 67; and *Garrard v. Pittsburg & C. R. R. Co.*, 29 Id. 154.

It is undeniable, from these authorities, that if the purchase in this case had been made by the firm of Odgen, Jones, & Co., it could not be sustained. Does the same principle apply to the purchase made by Smith, their clerk? It is not perceived upon what substantial ground a distinction can be drawn. Whatever duty his principals owed to the plaintiff, he equally owed the same. The rule, as we have seen, as laid down by Sugden, and which the authorities sustain, is, that the disability extends to all persons who, being employed or concerned in the affairs of another, acquired a knowledge of his property. Now, it is undeniable that Hathaway and Smith were employed or concerned in the affairs of the plaintiff relating to these lands, and acquired knowledge concerning them. The defendant Smith was the clerk, or assistant, of his principals. He was their agent, and employed in and about their business. Whatever disabilities they labored under equally attached to him. It would work an entire abrogation of the rule to hold the principal subject to the operation of this rule, and exempt his clerks and agents from its effect. It would be opening the door to its evasion, so that it would lose all its vitality and virtue. The courts have not so dealt with the application of this rule. It has been held that the partners in business of an assignee in bankruptcy are equally disqualified from purchasing as the assignee himself: *Ex parte Barnett*, 7 Jur. 116. It has been held to disqualify the solicitor to a commission in bankruptcy from becoming a purchaser at a sale of the bankrupt's effects: *Owen v. Foulkes*, 6 Ves. 630, note b; *Ex parte James*, 8 Id. 337;

Ex parte Linwood and *Ex parte Churchill*, before Lord Rosslyn, cited 8 Id. 343; *Ex parte Bennett*, 10 Id. 381. The precise point now under consideration arose before Vice-Chancellor Sandford, in *Poillon v. Martin*, 1 Sandf. Ch. 569, where he held that the clerk of an attorney was as much prohibited from purchasing from a client as the attorney himself; that the principle of the rule extended as well to him as to the attorney himself.

I think this is the spirit of all the authorities, and that the honesty and fairness of transactions between principals and their agents demand a firm adherence to these rules, and to bring within their operation, not only the agent himself, but those in his immediate employ, and who are engaged in the transaction of his business, which is, necessarily, the business of the agent's principal. It cannot be disguised that this sale was negotiated by one clerk with another clerk of the plaintiff's agents. All the mischiefs which the rules adverted to were designed to prevent are apparent in this case. Assuming that it has been shown that the purchase made by Smith is obnoxious to the objections which have been urged, it follows that the plaintiff is entitled to a reconveyance of his lands. But as it appears that Smith, by his own act, in selling a portion of the lands, is incapable of doing that equity which the law commands, it follows that the plaintiff is entitled to the proceeds of such sales. The decree, or judgment, of the special term was, therefore, correct, in requiring him to reconvey to the plaintiff all such portions of the lands as remain unsold, and to account to him and pay over the proceeds of all those parts which have been sold. We see no objection which Smith can properly make to that part of the decree which gives to him the election to pay to the plaintiff the ascertained value of the plaintiff's lands in lieu of such reconveyance and accounting.

The order at the general term, granting a new trial, so far as it relates to the defendant Smith, is reversed, and the judgment at the special term, as to him, affirmed with costs. And the order at the general term, granting a new trial as to the defendant Ogden, is affirmed, and in pursuance of the plaintiff's stipulation, judgment absolute is rendered against him in favor of the defendant Ogden, by the dismissal of the complaint against him, with costs.

All the judges concurred.

Ordered accordingly.

JURISDICTION OF EQUITY OVER LAND AND PROPERTY IN ANOTHER STATE: See *Newton v. Bronson*, 67 Am. Dec. 89, and note discussing the subject. Independent of the code, where the court has jurisdiction of the proper parties, it may by its judgment compel them to do equity in relation to lands located without its jurisdiction: *Vail v. Jones*, 31 Ind. 469; and especially, in cases of fraud, trust, or contract, the jurisdiction of a court of equity is sustainable wherever the person can be found, although lands not within the jurisdiction of the court may be affected by the decree: *French v. Maguire*, 55 How. Pr. 474; *Atlantic etc. Tel. Co. v. Baltimore etc. R. R.*, 14 Jones & S. 388. The principal case is cited to the foregoing points; and in *Home Ins. Co. v. Pennsylvania R. R.*, 11 Hun, 184, it is also cited as furnishing illustrations of instances in which a court of equity may exercise its authority relative to land in a foreign state, where jurisdiction has been acquired by the appearance of the parties.

ONE WHO UNDERTAKES TO ACT FOR ANOTHER CANNOT, IN SAME MATTER, ACT FOR HIMSELF: *Dutton v. Willner*, 52 N. Y. 319; *Forbes v. Halsey*, 26 Id. 65; and this rule applies to all persons standing in relations of trust, involving duties inconsistent with such persons dealing with the property as their own: *Ten Eyck v. Craig*, 62 Id. 420; *Wager v. Reid*, 3 Thomp. & C. 335. The highest degree of faithfulness in action and responsibility for misconduct is exacted of one who occupies a fiduciary relation towards another: *Rockford etc. R. R. v. Boody*, 56 Id. 461. Thus one who occupies such a relation is prohibited from purchasing or dealing with the property of the other; *Colburn v. Martin*, 1 Abb. App. Dec. 391; S. C., 3 Keyes, 298; 5 Abb. Pr., N. S., 323; 36 How. Pr. 152; *Blake v. Buffalo Creek R. R.*, 54 N. Y. 491; and see *Moseley v. Lane*, 62 Am. Dec. 752; *Follansbee v. Kilbreth*, 65 Id. 691; *Winsall v. Stewart*, 70 Id. 549; *Chorpenning's Appeal*, 72 Id. 789. A trustee, therefore, cannot manage or deal with the property for his own benefit: *Lingke v. Wilkinson*, 57 N. Y. 451, 455. He is excluded from purchasing the trust property: *Tisdale v. Tisdale*, 64 Am. Dec. 775, and note collecting prior cases; *Jewett v. Miller*, 61 Id. 751; *Mulford v. Minch*, 64 Id. 472; *Chorpenning's Appeal*, 72 Id. 789; *Bank of Old Dominion v. Dubuque etc. R. R.*, 74 Id. 302; *Graves v. Waterman*, 4 Hun, 689; *Duncomb v. New York etc. R. R.*, 22 Id. 135; *Colburn v. Morton*, 1 Abb. App. Dec. 385; S. C., 3 Keyes, 305; 5 Abb. Pr., N. S., 316; 36 How. Pr. 160; *Green v. Green*, 2 Redf. 412; and must reconvey or account for the value of trust property taken by him: *Holman v. Holman*, 66 Barb. 222. The fact that there was no fraud in the transaction is immaterial: *Lingke v. Wilkinson*, 57 N. Y. 452, 453, per Dwight, C., dissenting; *Frothingham v. Barney*, 6 Hun, 372. Any act of a trustee in violation of his trust is invalid: *Butts v. Wood*, 37 N. Y. 319. To afford complete protection to a trustee who deals with a *certain que trust*, such statement and information should be given that a court may see that the proposed dealing is fair, and that the act was done with as much knowledge as possessed by the trustee in respect to the trust property: *Pomeroy v. Pomeroy*, 54 How. Pr. 232.

The title of an administrator or executor, also, who acts in the double capacity of seller and buyer of the trust property is voidable: *People v. Open Board of Stock Brokers' Building Co.*, 92 N. Y. 103; and see *Wright v. Arnold*, 61 Am. Dec. 172; *Mulford v. Minch*, 64 Id. 472; *Remick v. Butterfield*, Id. 316; *Martin v. Wyncoop*, 74 Id. 209, and the notes thereto. And where an administrator conveys lands of the estate in fraud thereof to one with knowledge, there is no inconsistency in asking judgment against the administrator as to that portion of the lands sold by the grantee, and a reconveyance of that portion remaining unsold: *Bassett v. Warner*, 23 Wis. 690.

Directors of corporations occupy a fiduciary position, and cannot deal on their own behalf in respect to any matter involving such confidence: *Duncomb v. New York etc. R. R.*, 84 N. Y. 199; and see *Hodges v. New England Screw Co.*, 53 Am. Dec. 624, and note. So directors, who have power to sell stock for non-payment of assessments, and to receive the proceeds of the sale, are obliged, after deducting the amount of the assessments, to pay over to the stockholders in default the residue of the moneys arising on the sale: *Mitchell v. Vermont Mining Co.*, 47 How. Pr. 223. It is improper, also, for the officers of a company to vote for appropriations of money to themselves for services before and after its organization: *Blatchford v. Ross*, 54 Barb. 48; S. C., 37 How. Pr. 115. And the treasurer of a corporation, who purchases its stock at a discount, cannot, by selling it to the corporation at par, make the corporation his debtor, and thus extinguish his liability to it for moneys held in his hands as its treasurer: *East New York etc. R. R. v. Elmore*, 5 Hun, 217.

If an agent to purchase buys from himself without authority, the principal may rescind: *Conkey v. Bond*, 36 N. Y. 430; S. C., 3 Abb. Pr., N. S., 418. So an agent to sell cannot himself purchase: *Keighler v. Savage Mfg. Co.*, 71 Am. Dec. 600; or procure a purchaser for whom he was also acting as agent, and be entitled to commission: *Carman v. Beach*, 63 N. Y. 100. And the fiduciary relation of an agent prevents him from assuming to himself any advantages of bargains touching the subject of his agency: *Bain v. Brown*, 7 Lans. 510. The clerk of a broker employed to make a sale of land who has access to the correspondence between the broker and his principal, stands in such a relation of confidence to the latter that if he becomes the purchaser he is chargeable as trustee for the vendor, and must reconvey or account for the value of the land: *Lingke v. Wilkinson*, 57 N. Y. 451, 457; *Cheeseman v. Sturges*, 9 Bosw. 255; *Levy v. Brush*, 8 Abb. Pr., N. S., 431; S. C., 1 Sweeny, 664; *Newcomb v. Brooks*, 16 W. Va. 71. So a partner of a person holding relations of trust and confidence towards another is equally with that person disabled from purchasing the trust property: *Fulton v. Whitney*, 5 Hun, 19. The principal case is cited in the foregoing, with the exception of those from the American Decisions; and see it also cited in *Spelman v. Terry*, 8 Id. 208, as collecting many cases on the subject of the duty of a trustee to his *cestui que trust*.

THE PRINCIPAL CASE IS ALSO CITED in *Barry v. Mutual Life Ins. Co.*, 49 How. Pr. 509, to the point that where a court has first obtained jurisdiction of the parties to a controversy, and the subject-matter of it, and exercises that jurisdiction to a final determination of all the rights involved, its judgment will be respected, and can be enforced elsewhere; and in *Johnson v. Albany etc. R. R.*, 54 N. Y. 429, to the point that it is the duty of a general term of the supreme court, where the facts require it, to reverse a judgment as to one or more of several defendants and affirm it as to others. It is referred to in *Loeb v. Mathis*, 37 Ind. 316, to the effect that a decree in a suit by a judgment creditor to set aside a fraudulent deed made by the execution defendant, so that the land could be made subject to execution on the plaintiff's judgment, is a decree *in personam*, and not *in rem*; and cited in *Fulton v. Whitney*, 5 Hun, 20, as giving the history of and approving *York Building Association v. Mackenzie*, 3 Paton, 378; and also in *Seacord v. Morgan*, 4 Abb. App. Dec. 174; S. C., 4 Abb., N. S., 252; 35 How. Pr. 490; 3 Keyes, 639, in commenting upon the unreported case of *Gardner v. Barney*, which concerned the liability of sureties on an undertaking on appeal given in the principal case.

BELMONT v. COMAN.

[22 NEW YORK, 423.]

GRANTOR DOES NOT BECOME PERSONALLY LIABLE FOR PAYMENT OF MORTGAGE DEBTS, by accepting a deed containing full covenants, reciting a consideration of twelve thousand dollars, and declaring in the *habendum* clause that the conveyance is subject to four mortgages, "which said four mortgages, amounting in the aggregate to the sum of eight thousand five hundred dollars, has been estimated as part of the consideration money of this conveyance, and has been deducted therefrom."

APPEAL by the plaintiff from an order of the supreme court, at general term, reversing a judgment by a referee in his favor against the defendant Coman, and granting a new trial. One Gratacap, who was the owner of certain premises, executed four mortgages thereon to one Griffin, who assigned them to the plaintiff. After the execution of the mortgages, Gratacap conveyed the premises to the defendant Coman, by a deed containing full covenants, and expressing the consideration as twelve thousand dollars. The *habendum* clause declared that the conveyance was subject to four mortgages, "which said four mortgages, amounting in the aggregate to the sum of eight thousand five hundred dollars, has been estimated as part of the consideration money of this conveyance, and has been deducted therefrom." This action was brought to foreclose the mortgages, and to charge Coman personally with any deficiency arising from the sale. The referee gave the plaintiff judgment, which was reversed at general term, on appeal by Coman, and a new trial granted. The plaintiff appealed, and stipulated that if the order should be affirmed, judgment absolute might be rendered against him.

Thomas H. Rodman, for the appellant.

John H. Reynolds, for the respondent.

By Court, COMSTOCK, C. J. The consideration expressed in the introductory part of the deed is stated to be twelve thousand dollars. In the *habendum* clause, the conveyance is declared, in substance, to be subject to the sum of eight thousand five hundred dollars, secured by certain prior mortgages given by the grantor; which sum, it is further declared, has been estimated as a part of the consideration money, and deducted therefrom. The grantor was personally liable upon his bonds for the amount of these mortgages, and his deed contained the usual full covenants. The question upon these facts

is, whether the grantee became personally bound to pay the debts thus charged upon the land.

The authorities do not furnish any guide which is entirely satisfactory in the solution of this question. The cases all agree that the purchaser of a mere equity of redemption, without any words in the grant importing that he assumes the payment of the mortgage, does not bind himself personally to pay the debt. It is quite clear that in such a case there is no implied promise or covenant: by which is meant that the law does not raise an obligation where none is in terms expressed. On the other hand, it needs no authority to prove that if, in the conveyance, there are words importing that the grantee will pay the debt, he is deemed to have entered into an express undertaking to do so, although he does not sign or seal the instrument. The acceptance of a deed containing such language is evidence of the most satisfactory kind that he has promised to do what the deed says he is to do. And precise and formal words are unnecessary. As in all other cases of contract, the inquiry is, What was the intention of the parties? We are to seek for that intention in this case, keeping in mind that there is no rule of law which imposes the liability in question unless the parties have declared it in words appropriate or sufficient to express that meaning.

I attach but little importance to the consideration clause of this deed. Twelve thousand dollars was the value of the premises agreed on. Whether it was all to be paid down, or part was to remain as a prior charge on the land, with or without personal obligation on the part of the purchaser to pay it, the more usual practice in conveyancing would be to state the whole sum as the consideration of the purchase. If this is not more usual, it is, at least, a practice so very frequent and so indiscriminate that no inference favorable to the creation of a personal liability can be drawn from its adoption in the example now before us. The consideration clause is not untrue, according to any interpretation of the deed. We may call the purchase-money twelve thousand dollars, and yet, quite consistently with that, the parties may have perfectly understood and intended that only a portion of the sum was to be paid in money by the grantee, while the residue was to be paid out of the land, and only in that manner, unless the purchaser should voluntarily redeem his estate from the charge upon it.

Looking, then, at the *habendum* clause, I cannot satisfy myself that it has the meaning claimed for it by the appel-

lant. The deed, as before observed, contains full covenants. These would compel the grantor himself to take care of the mortgages, unless they were qualified by other language declaratory of a contrary intention. To qualify those covenants, I think, was the primary purpose of the clause in question; and that purpose is sufficient to account for the language in which it is expressed. It states that the deed is subject to the mortgages, the sum of which has been estimated as a part of the purchase-money and deducted therefrom. If the language had stopped with declaring the subjection of the land to the lien of the mortgages, it would have been the ordinary case of the purchase of a mere equity of redemption. According to all the cases, the land would have been the primary fund for the payment of the mortgages, yet without any other liability on the part of the grantee. But the other words, it seems to me, import nothing additional or different. On the contrary, they appear to be used for greater caution. They declare that the amount of the mortgages has been deducted from the consideration which had been previously set forth. The apparent meaning of this is, that so much of the purchase-money as the mortgages amount to, being deducted, is not to be paid, except as it is charged upon the premises. It is one of the matters of fact found at the trial that the parties thus understood each other. This is no reason for a misinterpretation of the written language they used; but I am glad to believe that they did not disappoint their own intentions. The order appealed from must be affirmed, and judgment absolute rendered for the respondent.

All the judges concurred.

Judgment accordingly.

GRANTOR OF LAND IS NOT PERSONALLY LIABLE FOR MORTGAGE DEBT UNLESS ASSUMED BY HIM: *Cumberland v. Codrington*, 8 Am. Dec. 492; *Adams v. Hudson County Bank*, 64 Id. 469. The principal case is cited to this point in *Gage v. Brewster*, 31 N. Y. 221; *Dingeldein v. Third Avenue R. R.*, 37 Id. 577, 578; *Knickerbocker Life Ins. Co. v. Nelson*, 78 Id. 151; S. C., 7 Abb. N. C. 182; *Smith v. Truslow*, 84 N. Y. 662; *Equitable Life Assur. Soc. v. Bostwick*, 100 Id. 629; *Fiske v. Tolman*, 124 Mass. 257; *Prime v. Kochler*, 7 Daly, 348. One who purchases subject to a mortgage is simply the owner of the equity of redemption: *Chamberlain v. Dempsey*, 9 Bosw. 224; *Dingeldein v. Third Avenue R. R.*, *supra*, both citing the principal case; and see *Frische v. Kramer's Leases*, 47 Am. Dec. 368. Where the owner conveys premises subject to a mortgage, and deducts the amount thereof from the consideration, this does not make the grantee personally liable for the mortgage debt: *Rensen v. Beckman*, 25 N. Y. 560; nor is a grantee personally liable for the mortgage

debt, where the conveyance contains covenants of warranty, but the incumbrance is excepted therefrom, and estimated as a part of the purchase-price: *Lewis v. Day*, 53 Iowa, 579; so one who takes an assignment of the interest of a vendee in a contract for the sale of land, and enters into possession, is not personally liable for the moneys thereafter to become due on the contract without an agreement, express or implied, to pay them: *Adams v. Wadhams*, 40 Barb. 227, all citing the principal case.

GRANTEE OF LAND IS PERSONALLY LIABLE FOR MORTGAGE DEBT WHEN ASSUMED BY HIM: *Kearney v. Tanner*, 17 Am. Dec. 648; *Trotter v. Hughes*, 62 Id. 137. The principal case is cited to this effect in *Whiting v. Gearty*, 14 Hun, 500; *Burr v. Beers*, 24 N. Y. 179; *Ricard v. Sanderson*, 41 Id. 181; *Fithian v. Monks*, 43 Mo. 519; and if a grantee has assumed the mortgage debt, and the mortgagor is compelled to pay it, equity will relieve the mortgagor and subrogate him to all the rights of the mortgagee: *Baker v. Terrell*, 8 Minn. 199. Where the amount of the mortgage is to be paid as part of the purchase-money, it is an assumption of the debt: *Thayer v. Torrey*, 37 N. J. L. 344. But precise and formal words are unnecessary to impose upon a grantee an engagement to pay off a mortgage; the inquiry as to the intention of the parties: *Collins v. Rowe*, 1 Abb. N. C. 99. If there are words in a conveyance, importing that the grantee will pay the debt, he is deemed to have entered into an express undertaking to do so, although he does not sign or seal the instrument: *Atlantic Dock Co. v. Leavitt*, 54 N. Y. 39; *Tuthill v. Wilson*, 90 Id. 426; *Real Estate Trust Co. v. Balch*, 13 Jones & S. 531; *Wales v. Sherwood*, 52 How. Pr. 414; and see *Dingeldein v. Third Avenue R. R.*, 9 Bosw. 94. Oral evidence, however, is inadmissible to show the assumption of a mortgage: *Goelet v. Farley*, 57 How. Pr. 175. The principal case is cited in the foregoing, but distinguished in *Douglass v. Cross*, 56 Id. 331, in holding that where a deed expressed a certain sum as the consideration, but contained a clause, "subject, however, to the assumption as a part of the consideration," of the conveyance of a mortgage, the grantee was personally liable to pay the mortgage: See note to *Klapworth v. Dresser*, ante, p. 72.

YALE v. DEDERER.

[22 NEW YORK, 450.]

MARRIED WOMAN'S SEPARATE ESTATE IS NOT CHARGEABLE WITH HER DEBTS, unless her intention to make it so is indicated in the contract itself, or the debt is contracted for the direct benefit of the separate estate.

MARRIED WOMAN'S SEPARATE ESTATE IS NOT CHARGEABLE ON PROMISSORY NOTE signed by her as surety for her husband, although she intended thereby to charge her estate.

APPEAL from a judgment of the supreme court charging the lands of a married woman with payment of her promissory note. The defendant's husband had offered to buy the plaintiff's cows, but the plaintiff refused to sell unless the husband procured his wife to sign with him a note for the price. The wife consented, saying at the time that if her husband was not

able to pay it she was. The note was afterwards renewed, and an action is now brought to obtain payment from the defendant's separate estate. The judge found that the defendant "intended to charge and did expressly charge her separate estate for the payment of the note," and gave judgment that enough of the separate estate be sold to satisfy the plaintiff's demand. The judgment was affirmed at general term, and the defendant appealed.

Henry M. Hyde, for the appellant.

Henry R. Mygatt, for the respondent.

By Court, SELDEN, J. The judge before whom this cause was last tried has found that the defendant, in giving the note upon which the action was founded, intended to charge her separate estate with its payment. In this respect only does the case, as now presented, differ from the same case when previously here: 18 N. Y. 265. For although the judge has also found, in his specification of facts, that she did charge her estate, yet this is a mere statement of the legal effect of the defendant's acts, and would have found a more appropriate place among the conclusions of law drawn by the judge from the facts proved.

It does not expressly appear from the statement of facts whether the title of the defendant to her separate estate was acquired before or after the acts of 1848 and 1849, nor, consequently, whether that title was legal or equitable. It is, perhaps, to be inferred from the form of expression used by the judge in describing the defendant's estate, viz., "a separate estate consisting of three farms," that it was a legal estate acquired subsequently to the passing of these acts. This, however, is immaterial, it having been settled when this case was formerly here that the statutes of 1848 and 1849 did not remove the general disability of married women to bind themselves by their contracts; but that the power conferred by those statutes to hold to their separate use, and to convey and devise all their real and personal estate as if unmarried, carried with it the power to charge such estate substantially in the manner and to the extent previously authorized by the rules of equity in respect to separate estates.

To dispose of this case, therefore, we have only to ascertain whether a married woman having, prior to the statutes of 1848 and 1849, a separate equitable estate, could create a charge upon that estate, by giving a promissory note for the debt of

her husband, intending thereby to charge her estate, but without indicating this intention in any manner by the contents of the note. It was settled, when the case was here before, that the bare giving of such a note did not bind the estate. It becomes necessary now to inquire whether the additional fact that the wife, at the time of making the note, intended to charge her separate estate, changes the rule.

Much has been said in the course of the decisions on this subject in regard to the intention of the wife at the time of making the contract; and in order properly to appreciate the force of these remarks, a brief retrospect of the law of separate estates is required. I shall not attempt a review of the cases, confused and contradictory as some of them are, but desire to call attention to one or two features of the controversy carried on in the English courts for nearly a century, and which can hardly, even now, be considered as ended, in regard to the effect of the contracts of married women upon their separate estates. If the instrument by which the estate was created conferred upon the wife either a general or qualified power of disposition, no one ever questioned her rights to execute this power; the doubts which arose related to her right to dispose of or charge the property, independently of any such special authority; and this right was established soon after the introduction of such estates, upon the ground that the right of disposal was a necessary incident of the right of property.

That this universal *jus disponendi* was the sole and only foundation of the right in question is clear. Lord Thurlow, in the case of *Fettiplace v. Gorges*, 3 Bro. C. C. 8, places the right upon this ground, and no other basis has ever been suggested for it. Assuming this, then, to be the foundation of the right, it is plain that the wife, to avail herself of it, must make some disposition of the specific property itself. It is clearly impossible to deduce, from the *jus disponendi*, which accompanies all rights of property, power to make any contracts, except such as related directly to the property to which the right of disposition is attached; and yet the master of the rolls, in *Norton v. Turvill*, 2 P. Wms. 144, and in *Stanford v. Marshall*, 2 Atk. 68, held the separate estate of a married woman liable for the payment of her bond, although the bond in no manner referred to such separate estate; and in the latter case was given for money lent to the husband.

The reasoning upon which these cases are said to have proceeded, and upon which they were followed by Lord Thurlow,

was this: That it being the rule in equity that a wife who had a separate estate might deal with such estate in the same manner as if she were sole, it followed that such estate was liable for her engagements, in the same manner as it would be if she were a *feme sole*. The equitable rule, which, being founded entirely in the right of the wife to dispose of her property, could go no further than to allow her to make contracts specifically appropriating or charging her separate estate, was thus expanded so as to enable her to contract generally without in any manner referring to such estate. The doctrine was justly characterized by Chancellor Kent, in the case of *Methodist Episcopal Church v. Jaques*, 3 Johns. Ch. 77, where, speaking of the two cases to which I have referred, among others, he says: "It is difficult to perceive upon what reasoning or doctrine the bond or parol promises of a *feme covert* could for a moment be deemed valid. She is incapable of contracting, according to the 'common right' mentioned by Lord Maccolesfield, and if investing her with separate property gives her the capacity of a *feme sole*, it is only when she is directly dealing with that very property. The cases do not pretend to give her any of the rights of a *feme sole* in any other view, or for any other purpose."

But although Lord Thurlow followed, as we have said, what he supposed to be the rule established by the cases referred to, he nevertheless saw the fallacy upon which those cases were based, as appears by his remarks in the case of *Hulme v. Tenant*, 1 Bro. C. C. 16, the leading case on this subject. There the separate estate of a wife was held liable for the payment of her bond given for money borrowed, part of which had been borrowed by her husband, and the residue by herself. After referring to the previous cases, Lord Thurlow says: "I take it, therefore, it is impossible to say but that a *feme covert* is competent to act as a *feme sole* with respect to her separate property, when settled to her separate use; but the question here goes a little beyond that; it is not only how far she may act upon her separate property—I have no doubt about that—but the question is, how far her general personal engagements shall be executed out of her separate property." Still, although thus clearly seeing the distinction which ought, as it would seem, to have been decisive against the claim, he nevertheless yields to the authority of the previous cases, and holds the separate estate liable.

The debt in the last case, as well as in the previous cases of

Norton v. Turvill, 2 P. Wms. 144, and *Stanford v. Marshall*, 2 Atk. 68, was by bond. But it is obvious that if the principle upon which they were based was sound, it embraced every debt of the wife, however created; whether by bond, note, or by a mere oral promise; and so the doctrine was subsequently applied by Lord Thurlow himself in the case of *Lillia v. Airey*, 1 Ves. jun. 277. It is true that in this case the separate estate consisted of a specific sum allowed by the husband to the wife, by way of separate maintenance, and resort has been sometimes had to that fact as explaining the decision. But no reliance is placed upon this circumstance by Lord Thurlow, nor could it properly affect the result. The decision was the legitimate consequence of the theory of the wife's liability adopted in the previous cases.

But the unsoundness of this theory was soon discovered, and it was rejected two years afterwards, in the case of *Bolton v. Williams*, 2 Ves. jun. 138, by Lord Chancellor Loughborough, who denied the liability of a married woman's separate estate for her general parol engagements, and explained the previous cases upon the ground that the securities which the wife had executed operated as appointments of her separate property, that is, as appropriations or pledges of such property for the payment of the debt for which the security was given.

This new theory that a written security was an appointment was as plainly erroneous as that for which it was substituted. It was evidently a pure fiction. The doctrine proceeded upon the assumption that a wife's separate estate is not liable for her general engagements, but only for such as are specifically charged upon it, and yet held it liable for a bond or note which in no manner referred to such estate. If these written securities operated as appointments, then it must necessarily follow that every such security would create an equitable charge or lien upon the estate, from the time of its execution; still, they were uniformly treated, not as specific liens, but as mere general debts, having no priority over other and later claims. It was expressly held by Sir John Leach, master of the rolls, in an anonymous case, *Anonymous*, 18 Ves. 258, where the questions arose, that in such cases there was no priority, and that all the debts must be paid equally.

But, notwithstanding these inconsistencies, this doctrine that a written security was an appointment and a charge, while it was otherwise with a mere parol promise, was maintained substantially unchanged, from the time of its introduc-

tion by Lord Loughborough, in *Bolton v. Williams*, 2 Ves. jun. 138, until the case of *Murray v. Barlee*, 4 Sim. 82, when Lord Brougham rejected the distinction between a written security and a promise by parol, and extended the rule so as to make the mere parol engagements of a wife a charge, as well as her bond or note. Speaking on that subject, he says: "I own I can conceive no reason for drawing any such distinction. If, in respect of her separate estate, the wife is in equity taken as a *feme sole*, and can charge it by instruments absolutely void at law, can there be any reason for holding that her liability, or more properly her power of affecting the separate estate, shall only be exercised by a written instrument? Are we entitled to invent a rule, to add a new chapter to the statute of frauds, and to require writing where the act requires none? Is there any equity reaching written dealings with the property which extends not also to dealing in other ways, as by sale and delivery of goods? Shall necessary supplies for her maintenance not touch the estate, and yet money furnished to squander away at play be a charge on it, if fortified by a scrap of writing? No such distinction can be taken upon any conceivable principle."

It is impossible to deny the force and conclusiveness of this reasoning. The distinction which it combats was clearly untenable. But the learned chancellor was, I think, less successful in another part of the same opinion, in which he attempts to explain the ground upon which it had been previously held that the bond or note of a married woman, and upon which he held that all her engagements, whether in writing or by parol, were charged upon her separate estate. He says that although originally the courts supposed that to affect the separate estate there must be some real charge, as a mortgage, or an instrument amounting to the execution of a power, afterwards the intention of the wife "was more regarded, and the court only required to be satisfied that she intended to deal with her separate property." The reasoning by which her intention was supposed to be established was, that when a married woman gives her bond or note, or contracts a debt in any other manner, it must be presumed that she intended it to have some effect; and inasmuch as it is void at law and can have no effect unless it is a charge upon her separate estate, it follows that she must intend it to be such a charge.

The intention here spoken of is not an intention which is proved by extraneous evidence *dehors* the contract, but an in-

tention which is to be inferred from, and is therefore embraced in or manifested by, the contract itself. No court has ever held or intimated that parol evidence was admissible to prove that the bond or note of a *feme covert* was intended to be a charge upon her estate. To permit this would be in direct conflict with the rule which excludes all parol evidence offered to explain a written instrument. The intent, to be of any importance, must be a part of the contract; that is, the true meaning of the contract, when justly interpreted, must be, that the debt which it creates should be a charge upon the estate. This case, therefore, is not materially strengthened on the part of the plaintiff by the finding of the judge, that the defendant intended the debt to be a charge, as that intention, if it existed, forms no part of the note, which must be regarded as the only evidence of the contract.

But the reasoning of Lord Brougham, in *Murray v. Barlee*, 4 Sim. 82, has been since overthrown, and the doctrine based upon it is not now the doctrine of the English courts. In the case of *Owens v. Dickenson*, 1 Cr. & Ph. 48, Lord Chancellor Cottenham appears to have seen that there could be no real foundation for the assumption that because a married woman had executed a bond or note, or contracted a debt in any other form, therefore she must have intended to charge such debt upon her separate estate. He first shows, what indeed is very plain, that if the doctrine is sound, then every debt must become a specific lien upon the separate estate, to be paid in the order of its priority; while Lord Brougham held that such debts are all to be paid *pari passu*. He then argues, very conclusively, to prove that a contract which is entirely silent as to the separate estate, and makes no reference whatever to its existence, cannot by any legal reasoning be shown to have been intended as a disposition of such estate.

After thus removing the only ground upon which every English chancellor, from Lord Loughborough to Lord Brougham, had held a bond or note, and upon which the latter had held every other contract, to create a charge, Lord Cottenham proceeds to inaugurate an entirely new doctrine on the subject, which is, that equity lays hold of the separate property, and appropriates it to the payment of the debt: not on account of anything contained in the contract; not because the wife, by any agreement, either express or implied, has made the debt a charge; but for reasons which I will give in the learned chancellor's own words: "The separate property of a married

woman being a creature of equity, it follows that if she has a power to deal with it, she has the other powers incident to property in general, namely, the power of contracting debts to be paid out of it; and inasmuch as her creditors have not the means at law of compelling payment of those debts, a court of equity takes upon itself to give effect to them, not as personal liabilities, but by laying hold of the separate property, as the only means by which they can be satisfied."

This is by no means a return to the primary doctrine of the English courts on this subject. Lord Thurlow never suggested that equity had any power to take the separate property of a married woman and appropriate it to the payment of debts which she had never in any manner charged upon it. It is an attempt to support, by an entirely new process of reasoning, a course of decision which Lord Cottenham plainly saw could not be sustained upon any of the grounds upon which it had been previously placed.

But whether we adopt this last phase which the shifting doctrine in respect to a wife's separate estate has assumed, or not, it is certain that the judgment in the present case cannot be upheld. As was shown by Judge Comstock when this case was here before, mere equity, not resting upon any positive contract, will never seize upon the separate estate of the wife, and appropriate it to the payment of a debt of the husband, for which she is a mere surety; and it follows from what has been previously said, that the estate of the defendant cannot be held liable upon this note, upon the ground that she intended to make it a charge; because to make such an intent of any importance, it must be either expressed or implied in the terms of the contract.

But I am unwilling to leave it to be inferred that I assent to the doctrine of Lord Cottenham. It seems to me even less defensible than the theories which preceded it. Those theories conceded that the separate estate of a *feme covert* could not be appropriated in payment of her debt, unless she voluntarily charged such debt upon her estate. Their error consisted in raising an implication of an actual appointment or charge upon wholly insufficient grounds. But Lord Cottenham's doctrine denies the necessity of any intentional charge of the debt at all by the wife upon her separate estate, although it at the same time makes her power to dispose of that estate the basis of its liability. His argument, when reduced to its simplest terms, is that a married woman, who has a separate estate, has power

in equity to charge any debt she may incur upon such estate; and inasmuch as the general creditors of such married woman, whose debts have not been thus charged, have no other means of collecting them, equity takes hold of the separate estate, and appropriates it to their payment.

Can this be sound? I am unable to see any logical connection between the premises and the conclusion. It may be very just, abstractly considered, that equity should thus dispose of the estate; but it is clearly impossible to deduce the doctrine from the *jus disponendi* of the wife, which is its only foundation. The truth would seem to be that this mode of dealing with the estates of married women, to the extent to which it has been carried by the English courts, could not be sustained by any process of legal reasoning, and hence the grounds upon which it was made to rest have been repeatedly changed, and the rule itself has been fluctuating and uncertain.

These views are not new. Judge Story, in his work on equity jurisprudence, says: "It has been remarked that this rule of holding that a general security, executed by a married woman, purporting only to create a personal demand, and not referring to her separate property, shall be intended as *prima facie* an appointment or charge upon her separate property, is a strong case of constructive implication by courts of equity, founded more upon a desire to do justice, than upon any satisfactory reasoning."

The courts of this state have never, as yet, adopted the doctrines of the English court of chancery on this subject, certainly not to their full extent; and it would, in my view, be inexpedient now to do so, for various reasons. If we attempt to follow a class of decisions which obviously rest upon no solid basis of principles, we can never arrive at any settled conclusion. The views of Lord Cottenham are no more likely to be permanent than those of his numerous predecessors. Some future lord chancellor may detect the fallacy of his reasoning as he detected that of Lord Brougham. No rule can ever be stable the reasons given for which are constantly changing. If we desire precision and certainty in this branch of the laws, we must recur to the foundation of the power of a *feme covert* to charge her separate estate; and this has heretofore arisen solely from her incidental power to dispose of that estate. Starting from this point, it is plain that no debt can be a charge which is not connected by agreement, either express or implied, with the estate. If contracted for the direct benefit of the estate

itself, it would, of course, become a lien, upon a well-founded presumption that the parties so intended, and in analogy to the doctrine of equitable mortgages for purchase-money. But no other kind of debt can, as it seems to me, be thus charged without some affirmative act of the wife evincing that intention; and there is no reason why her acts in this respect should not be tested by the same principles and rules of evidence which are applied to similar questions in other cases.

But there is a strong additional reason why this court should decline at this time to adopt the fictitious theories on this subject which have so long prevailed in the English courts. Married women are not hereafter to be indebted to equity merely for protection in the enjoyment of their separate estates. They hold them by a legal title and have a legal right to dispose of them. The acts of 1849 and 1860 are henceforth, if not repealed, to be the source of their power over such estates. There is no longer any foundation for the argument that as equity creates and protects these estates, equity has a right to control them. Rules, therefore, which have grown up under this idea, which I regard as to some extent illusory, will be hereafter entirely inappropriate. I shall not attempt at this time to put a construction upon those acts. That of 1860 authorizes married woman to carry on any trade or business upon their own account; but with this exception, the only contracts which it empowers them to make, are those which have direct reference to their separate property; and even this power, where the property consists of real estate, is subjected to a very important restriction; the consent in writing of the husband, or the authority of a court, being rendered essential to its exercise.

These provisions show that the legislature has not even now intended to remove the common-law disability of married women to bind themselves by their contracts at large. To be obligatory upon them or their estates under our last statute, their contracts must relate entirely to their separate property, or to the particular trade or business in which they are engaged. This legislation harmonizes with the views I have advanced in regard to the effect of the contracts of married women. It lends no countenance to the idea that the mere possession of separate estates renders their contracts having no relation to such estates binding upon them.

It would be impossible, as it seems to me, to hold, under our statutes, that the mere execution of a security by a married

woman not connected by agreement with her estate could be a charge upon it; and yet the power of disposal conferred by these statutes is, to say the least, as complete as that previously possessed by married women by virtue of the *jus disponendi*, which resulted from mere ownership. There would, therefore, be a manifest incongruity in holding, in the present case, that prior to our late statutes the debt of a *feme covert* not connected with her separate estate, nor in any manner charged by contract upon it, could be enforced against it, and then deciding, as we evidently must, that under those statutes an actual charge is necessary.

The judgment of the supreme court should be reversed, and there should be a new trial, with costs to abide the event.

All the judges concurred; COMSTOCK, C. J., and DENIO and BACON, JJ., upon the ground that the case as now presented did not vary from that when here before. A majority concurred in the opinion that the intention to charge the separate estate must be stated in the contract itself, or the consideration must be one going to the direct benefit of the estate.

Judgment reversed, and new trial ordered.

MARRIED WOMEN'S POWER TO CONTRACT AND BIND HER SEPARATE ESTATE THEREFOR: See *Yale v. Dederer*, 72 Am. Dec. 503, and note. This was the principal case as it first came before the court. It again appeared in *Yale v. Dederer*, 68 N. Y. 329-335, in which the previous decisions were explained.

At the common law, the contracts of a married woman were void, and could not be enforced against her: *Baken v. Harder*, 6 Thomp. & C. 442. Thus an action at law cannot be maintained upon the obligation of a married woman given upon the purchase of land: *Rüch v. Hyatt*, 3 MacAr. 556; nor can a married woman contract or be sued at law, even for necessities: *Valentine v. Lloyd*, 4 Abb. Pr., N. S., 374. But she may be charged in equity if she had separate property, and expressed her intention to bind it: *Baken v. Harder*, *supra*; and her separate estate was chargeable in equity for the payment of a debt contracted by her for its benefit prior to the act of 1860: *Fowler v. Seaman*, 40 N. Y. 593. Equity having recognized the validity of trusts for the separate use of married women, it followed as an incident that unless restrained, she might dispose of or bind her property: *Racouillat v. Sanssouci*, 32 Cal. 385; *Maclay v. Love*, 25 Id. 379; *Rüch v. Hyatt*, 3 MacAr. 554. In New York, the *jus disponendi* is recognized to the fullest extent: *Phillips v. Graves*, 20 Ohio St. 386; and see *Bressler v. Kent*, 61 Ill. 430. But married women are not, under the statutes, indebted to equity alone for the protection or enjoyment of their estates, they hold them by a legal title, and have a legal right to dispose of them: *Maclay v. Love*, 25 Cal. 381; *Gould v. Gould*, 29 How. Pr. 468. The principal case is cited to the foregoing.

The statutes of 1848 and 1849 of New York did not remove the general disability of married women to bind themselves by contracts: *Ballin v. Dillaye*,

37 N. Y. 37; S. C., 35 How. Pr. 219; *Cashman v. Henry*, 75 N. Y. 108, 110; *Bogert v. Gulick*, 65 Barb. 325; S. C., 45 How. Pr. 391; *Carpenter v. Mitchell*, 50 Ill. 472; *Williams v. Huguenin*, 69 Id. 220; *Conway v. Smith*, 13 Wis. 141, per Cole, J., dissenting; but the power conferred by those statutes to hold to their separate use, and to convey and devise all their real and personal estate as if unmarried, carried with it the power to charge such estate, substantially in the same manner and to the same extent previously authorized by the rules of equity in respect to separate estates: *Bailin v. Dillaye*, *supra*; *Corn Exchange Ins. Co. v. Babcock*, 42 N. Y. 641; S. C., 9 Abb. Pr., N. S., 184; *First Nat. Bank v. Garlinghouse*, 53 Barb. 617; S. C., 36 How. Pr. 373, and the debts are valid legal debts, and the estate is legally liable for them: *First Nat. Bank v. Garlinghouse*, *supra*; so her antecedent disabilities were necessarily so far modified as to secure her in the beneficial enjoyment of the new interests she was permitted by law to acquire: *Owen v. Cowley*, 36 N. Y. 603. In order to create a charge upon her separate estate, her intention to do so must be declared in the very contract which is the foundation of the charge, or the consideration must be obtained for the direct benefit of the estate itself: *White v. McNett*, 33 N. Y. 376; *Owen v. Cowley*, 36 Id. 604; *Bailin v. Dillaye*, 37 Id. 38; S. C., 35 How. Pr. 220; *Corn Exchange Ins. Co. v. Babcock*, 42 N. Y. 632, 639, 642, 644; S. C., 9 Abb. Pr., N. S., 175, 183, 185, 188; *Manhattan Brass &c. Co. v. Thompson*, 58 N. Y. 82; *Smith v. Dunning*, 61 Id. 251; *Gorman v. Cruger*, 69 Id. 89; *Miscallord v. Snyder*, 71 Id. 47; *Cashman v. Henry*, 75 Id. 108; *Afroehner v. McCarty*, 2 Abb. N. C. 78; *Owen v. Cowley*, 13 Abb. Pr. 21; S. C., 22 How. Pr. 13; 36 Barb. 56, per Clarke, J., dissenting; *Brown v. Hermann*, 14 Abb. Pr. 396, 397; *Cashman v. Henry*, 5 Abb. N. C. 234; S. C., 12 Jones & S. 101; *Coakley v. Chamberlain*, 8 Abb. Pr., N. S., 43; S. C., 38 How. Pr. 488; 1 Sweeny, 682; *Corn Exchange Ins. Co. v. Babcock*, 8 Abb. Pr., N. S., 249; S. C., 57 Barb. 225; *Phillips v. Wicks*, 14 Abb. Pr., N. S., 384; S. C., 45 How. Pr. 480; 4 Jones & S. 258; *Mattice v. Lillie*, 24 How. Pr. 265; *Ledlie v. Vrooman*, 41 Barb. 113; *White v. Story*, 43 Id. 129; S. C., 28 How. Pr. 180; *Manchester v. Sahler*, 47 Barb. 158; *Shorter v. Nelson*, 4 Lana. 117; *Hallock v. De Munn*, 2 Thomp. & C. 351; *Quassaic Nat. Bank v. Waddell*, 1 Han. 128; S. C., 3 Thomp. & C. 682, 683; *Salmon v. McElhany*, 23 Hun. 89; *Williamson v. Dodge*, 5 Thomp. & C. 499; *Eustaphie v. Ketchum*, 6 Id. 623; *Gorman v. Cruger*, 7 Id. 60, 61; *Nash v. Mitchell*, 8 Id. 474; *Vincent v. Buhler*, 1 Daly, 167; *Wood v. Sanchez*, 3 Id. 198; *Lewis v. Woods*, 4 Id. 243; *Ooster v. Isaacs*, 1 Robt. 183; *Frecknig v. Rolland*, 1 Jones & S. 501; *Schlesinger v. Hexter*, 2 Id. 504; *Madison Avenue Church v. Oliver St. Church*, 9 Id. 388; *Terry v. Hammonds*, 47 Cal. 35, 36; *Kantrowitz v. Prather*, 31 Ind. 98; *Burchard v. Dunbar*, 82 Ill. 453; *Heburn v. Warner*, 112 Mass. 277; *Levi v. Earl*, 30 Ohio St. 182; *Patrick v. Littell*, 36 Id. 84; *Orange Nat. Bank v. Traver*, 7 Fed. Rep. 150; and see *Stephen v. Beall*, 22 Wall. 338; *In re Howland*, 2 Nat. Bank. Reg. 114. Thus a married woman cannot bind herself by an executed contract for the letting of premises not belonging to her separate estate: *Andriot v. Lawrence*, 33 Barb. 143; nor by a promissory note signed by her merely as a surety: *Frecknig v. Rolland*, 53 N. Y. 424; *Ledelicy v. Powers*, 39 Barb. 560; S. C., 25 How. Pr. 245; notwithstanding she intended to bind it: *Burchard v. Dunbar*, 82 Ill. 453; nor is she charged for the payment of a note upon which she is a mere indorser: *Corn Exchange Ins. Co. v. Babcock*, 42 N. Y. 640; S. C., 9 Abb. Pr., N. S., 194; nor is a promissory note given by a married woman as surety for her husband, binding upon her at law, although it is expressed in the note that "she hereby charges her separate estate with the payment of this note:" *Kelec v. Taber*, 52 Barb. 128. The principal case is cited to all the foregoing

points. It is disapproved, however, in *Deering v. Boyle*, 8 Kan. 527-531, on the point that where a married woman signs a note as surety for her husband, it would not charge her separate estate, although she intended to do so; and see *Krouskop v. Shonts*, 51 Wis. 212. But it has been cited to the effect that the intent to charge cannot be shown by parol, where the contract is in writing: *McVey v. Cantrell*, 70 N. Y. 297; *Deck v. Johnson*, 2 Keyes, 349, 351; 1 Abb. App. Dec. 498, 499; *Baken v. Harder*, 6 Thomp. & C. 441; *Levi v. Earl*, 30 Ohio St. 177.

It was said by Ingraham, J., in *Owen v. Cawley*, 36 Barb. 54, 8 C., 13 Abb. Pr. 19, 22 How. Pr. 11, that the power of a married woman to charge her separate estate should not be extended beyond the rule laid down in the principal case; but in *Mazon v. Scott*, 55 N. Y. 250, 251, the same doctrine was applied to parol contracts; and it was held that a married woman's verbal contract, engaging board for herself and husband, promising to pay therefor, and charging her separate estate with such payment, was valid and binding; and see *Baken v. Harder*, 6 Thomp. & C. 443. In *Orange Nat. Bank v. Traver*, 7 Fed. Rep. 151, Deady, D. J., says that the rule established by the principal case was a departure from the current of authorities, but as an original and correct exposition of the elementary principles applicable to the question, it commended itself to the judgment of the court. In *Todd v. Lee*, 15 Wis. 368, it was observed that before the principal case, it was settled in New York that a married woman having a separate estate might bind it by her general engagements to pay debts contracted for its benefit, or on her own account, or for her benefit, upon its credit. While in *Leddekey v. Powers*, 39 Barb. 559, 8 C., 25 How. Pr. 245, it was remarked that whether the principal case would be considered as having authoritatively settled that the aid of a court of equity should be limited in the manner specified might be doubted. See the principal case distinguished in *Southwick v. Southwick*, 2 Sweeny, 246, in the application of the general rule; and also in *Macloy v. Love*, 25 Cal. 380, in that in New York the statute did not contain any restriction, as in California, upon the power or mode of a married woman's making a contract with reference to encumbering her estate. The principal case is also referred to in *O'Daily v. Morris*, 31 Ind. 112, for a discussion of the doctrine of rendering the separate estate of a wife liable for a debt created in reference to it and for its benefit.

The effect of a mortgage given by a married woman to secure the debt of her husband, is only to bind so much of her separate estate as it covered, and a judgment against her for a deficiency is error: *Payne v. Burnham*, 62 N. Y. 74; and a judgment against a married woman is defective, if it is not declared to be a special and specific lien upon real property therein particularly described: *Knickerbocker v. Smith*, 16 Abb. Pr. 243; it is too broad if entered as a personal judgment against her: *Id.*; both citing the principal case.

CASES IN EQUITY
IN THE
SUPREME COURT
OF
NORTH CAROLINA.

GAY v. BAKER.

[5 JONES'S EQUITY, 344.]

WHERE NOTHING APPEARS ON FACE OF TRUST DEED to indicate a contrary intention (a woman and her children being the beneficiaries), it will vest an estate in the woman and her children then born and in one *in ventre sa mere* as tenants in common, but no title vests in her children afterwards begotten.

THE deed to be construed in this action declares that, in consideration of the love and affection which the donor has for Elizabeth Gay and her children, he conveys to Henry Baker, jun., certain property, "to have and to hold, . . . to the said Henry Baker, jun., his executors and administrators, for the proper use, behoof, benefit, and advantage of my daughter aforesaid [Elizabeth Gay], together with her children aforesaid. . . . The whole equitable interest" in said property "is to belong to my daughter Elizabeth and her children in common." The opinion states the other facts sufficiently.

A. M. Lewis and B. F. Moore, for the plaintiffs.

R. B. Gilliam and J. J. Davis, for the defendants.

By Court, MANLY, J. The object of the bill is to obtain an account of a trust fund created by the deed of Henry Baker, under date of the sixteenth of May, 1819, and to obtain a sale and distribution of the same to the persons entitled under said deed. In the accomplishment of these objects, a construction of the deed is necessarily involved, and we are accordingly invoked by the pleadings to aid the trustee in putting a proper

construction upon it. The trustee submits to an account, but informs the court that Elizabeth Gay had several children born at the execution of the deed, one born within the ordinary period of gestation after, and several subsequent to that period, and inquires who of them are entitled.

We have considered the terms of the deed, and conclude that the children in being at the execution of the deed, including the one *en ventre*, alone take, to the exclusion of the others. The payment to James of one hundred and twenty-five dollars, which was a charge upon the fund, having been made, it will follow that the mother, Elizabeth, and the class of children designated, or their representatives, are entitled to absolute interests in the fund as tenants in common. After payment of the charge upon the fund, it was a naked or executed trust in the hands of Baker, which he might, at any moment, have been called upon to surrender, and it is therefore to be considered as a legal estate, and vests in such persons as answer the description of the donees and are capable of taking at the time.

It differs from the cases cited in the argument; viz., *Pouton v. McLemore*, 2 Dev. & B. Eq. 285; *Chesnut v. Meares*, 3 Jones Eq. 416; and *Coakley v. Daniel*, 4 Id. 89. In these it will be found that the trusts were either open and executory in their nature, or there was an intention, more or less manifest in the terms of the gifts or bequests, to divide the donees into classes, making one the primary and the other the secondary objects of the gifts.

But in the case now before us, such is not the character of the trust, nor have we been able to gather from the terms used any intention to give in succession, to the daughter the use for life, and then to her children; in which all after-born children would have taken. The donor has taken care, indeed, to express a different purpose, by declaring in one place that the daughter shall have the use, together with the children, and in another, that the whole equitable interest shall belong to the daughter and her children in common.

We do not feel at liberty, however much inclined to do so, for the sake of equality, to infer an intent contrary to the established interpretation of the words used. The case is analogous to and is controlled by the authority of *Moore v. Leach*, 5 Jones L. 88.

Although by a grant or common-law conveyance nothing could be transferred directly to a child in the womb, for the

reason that it could not be a party to such an instrument, yet in a conveyance to uses it was otherwise; for then, the legal estate vesting in the trustee, the rule of the common law was supposed to be satisfied, and the use was allowed to shift so as to include a child in the womb. This was, as I understand it, an indirect adoption of the more humane and practical rule of the civil code, which regarded a child in the womb as already born for all beneficial purposes.

The case of *Dupree v. Dupree*, Busb. Eq. 166 [59 Am. Dec. 590], is not opposed to the rule of construction here laid down, but will be found, upon examination, to be in accordance with it.

Our conclusion, then, is, that Elizabeth Gay and her children, born and living at the execution of the deed, and the one *en ventre sa mere* (or if any be dead, the representative of such), are entitled to the absolute estate in the trust fund, as tenants in common.

The parties can have a decree for the sale of the real estate belonging to the fund, and for an account and distribution of the entire fund according to the construction here given to the deed.

Decree accordingly.

TESTATOR DEVISED LAND TO TRUSTEE for the benefit of his daughter and her children, she having two living when the will was made, who survived the testator: it was held in *Hurst v. Satterwhite*, 85 N. C. 75, citing the principal case, that the testator's daughter and her children took a fee-simple state as tenants in common at the death of the testator.

NUNNERY v. CARTER.

[5 JONES'S EQUITY, 370.]

IF PERSONAL PROPERTY IS BEQUEATHED UPON CONDITION which, before the time of performance, becomes impossible to be performed, the property vests in the legatee upon the death of the testator, unless it appears that the performance of the condition was the sole motive for the making of the bequest.

PERSONAL PROPERTY WAS BEQUEATHED TO SON ON CONDITION that he take care of his mother during her life-time: it was held to be a condition subsequent, and the title vested in the legatee, to be divested upon his failure to take care of his mother. It was a continuing duty.

THE testator, Henry Carter, bequeathed to his son certain property, "provided he take care of his mother; if not, to be-whose that does take care of her;" he devised the balance of

his estate to his wife and his other children; the wife died before the testator, so that the condition became impossible of performance. The other facts are stated in the opinion.

C. G. Wright, for the plaintiffs.

Fowle, for the defendants.

By Court, BATTLE, J. The question presented for our determination involves the construction of the first clause of the will of the testator, Henry Carter, and it is whether the legacy therein given to James Carter depended upon a condition precedent, and was lost, because the condition became an impossible one before the death of the testator. The counsel for the plaintiffs contends strenuously for the affirmative, while the counsel for the defendant, James Carter, insists that the condition was a subsequent one, or that the legacy was intended by the testator to be vested, subject to the charge that the legatee should take care of his mother.

In the consideration of this question, it cannot be denied that the condition is, in form and appearance, precedent to the vesting of the legacy; but we learn from the highest authority that when such conditions are at first, or afterwards become, impossible, the rule applied to bequests of personalty is different from that which governs devises of realty. Thus in 2 Williams on Executors, 786, it is said that "with respect to conditions precedent which are impossible, a different rule is applicable to bequests of personal property from that which is prevalent respecting devises of realty.

By the common law of England, if a condition precedent is impossible, as to drink up all the water in the sea, the devise will be void. But by the civil law, which, on this subject, has been adopted by the courts of equity, when a condition precedent to the vesting of a legacy is impossible, the bequest is single, that is, discharged of the condition, and the legatee will be entitled as if the legacy were unconditional." It is admitted that there are exceptions to this rule of the civil law, as appears from what Mr. Williams says further on in the same page: "If, indeed, the impossibility of the condition were unknown to the testator, as where a legacy is given on condition that the legatee marries the testator's daughter, who happens to be then dead; or where the impossibility arises from a subsequent act of God, as if she be living at the date of the will, but dies before the marriage can be solemnized, the impracticability of the performance will be a bar to the claim of the

legatee; in cases, at least, such as those mentioned, where the performance of the condition appears to be the motive of the bequest."

Mr. Roper, in his learned treatise on legacies (vol. 1, pp. 505, 506), lays down the law in substantially the same terms, with this difference, however, as to the excepted cases of the civil law, that the legacy will be void only where the impossible condition is "the sole motive of the bequest." Applying these rules to the case now before us, the inquiry is presented: Was the taking care of his mother the sole motive of the legacy to James Carter? We are clearly of opinion it was not. The testator made provision in his will more or less for all his children, but whether the portions were equal, we are not informed. Of the property given to his wife for life, the testator directs that a part should be sold and divided among the other children, leaving his son James the remaining part, upon the condition of his taking care of his mother. She was not to be taken care of out of the property, for that was already given to her for life, and nothing is stated, either in the will or the pleadings, to show that she needed anything more than the ordinary care and attention due from a son to his mother. The motive of the legacy to James was doubtless, in part at least, the desire of the testator to provide for his son as he had provided for his other children, and it was not intended that he should lose the legacy, if his mother should not need his care.

We have hitherto considered the condition as if it were a single act, to be done or omitted at once, like the case of a legacy to one, provided he should marry the testator's daughter, mentioned in the works to which we have referred. But in truth, it is a continuing condition which might require the performance of many acts during a long series of years. Had his widow survived the testator, his son James was to be charged with the care of her during her whole life, whether long or short. We cannot believe that the testator intended the legacy to remain in a state of contingency during all that time, but he designed it to become vested at once, subject to be forfeited when his son should fail in the continued performance of the condition. That condition, therefore, though in form and appearance a precedent one, is, in reality and legal effect, a subsequent condition, and as such could not by becoming an impossible one prevent the legacy from taking effect. So all the authorities agree, as will be seen by referring

to those standard authors, which we have already cited. See also *Darley v. Langworthy*, 3 Bro. P. C. 359.

Decree accordingly.

WHEN LEGACY WILL VEST, NOTWITHSTANDING FAILURE TO PERFORM CONDITION.—LAW FAVORS VESTING OF ESTATES: 2 Jarman on Wills, 406, 799, and notes, where the authorities are fully cited; 2 Redfield on Wills, c. 2, sec. 16, subd. 7, *624. The effect of this principle is that property which is the subject of any testamentary disposition will vest in the donee immediately upon the taking effect of the will, or as soon thereafter as the donee comes into being, or the terms of the will permit. As the will takes effect at the death of the testator (*Lorieux v. Keller*, 68 Am. Dec. 696, note 701; *Marsh v. Marsh*, 64 Id. 598), any devise or bequest in favor of a person in being at that time takes effect at once: 2 Jarman on Wills, *supra*; unless the will expressly postpones the time of the vesting of the title in the donee: *Biddel's Appeal*, 99 Pa. St. 525. The vesting may take place at once, and the time of enjoyment be postponed: *Bushnell v. Carpenter*, 28 Hun, 19; 8 C., 92 N. Y. 270. Questions often arise as to whether words of futurity used in a will in making the gift are intended to postpone the vesting, or whether they merely point to deferred possession.

AS GENERAL RULE, where a testator creates a particular estate, and then disposes of the ulterior interests upon the happening of some event which he expressly declares shall determine the prior estate, the words describing the event, in the latter clause of the will, must be construed as referring to the determination of the possession or enjoyment under the prior gift, and not as an intention to postpone the vesting of the title to the property donated: 2 Jarman on Wills, c. 25, sec. 1, and note *800.

CONDITIONS ARE OF TWO KINDS: precedent, or such as must precede the vesting of the title of the estate in the donee; and subsequent, or such as follow such vesting.

WITH RESPECT TO CONDITIONS PRECEDENT, the rule as to the vesting of bequests of personal property and devises of real property differ in some respects. Where the condition is possible, and is stated clearly by the testator, so that his intention can be arrived at, the condition must be performed, or title will not vest: *Martin v. Ballou*, 13 Barb. 122. Sometimes, however, the conditions are impossible of performance, as drinking all the water in a river or the ocean; sometimes the conditions are void, because against public policy, as that the legatee shall never marry: *Waters v. Taxewell*, 9 Md. 309; 2 Pomeroy's Eq. Jur., sec. 933, and note 2, p. 438. In such cases, if it is a bequest of personal property, the bequest is single, that is, it is relieved of the condition, and the title vests in the donee, notwithstanding the condition is not performed: 2 Jarman on Wills, c. 27, *12, notes c, d, and 12; *Morley v. Reynolds*, 2 Hare, 570, 579.

IF PERSONAL PROPERTY IS BEQUEATHED UPON CONDITION PRECEDENT, which becomes impossible of performance before the time of performance arrives, the title vests in the legatee. To this point the principal case is cited in *McNeely v. McNeely*, 82 N. C. 186; see also *Merriam v. Wolcott*, 61 How. Pr. 377; *Catlin's Appeal*, 20 Pa. St. 243.

IF REAL PROPERTY IS DEVISED, subject to such a condition, the title to it will not vest in the devisee: Pomeroy's Eq. Jur., sec. 933, and note 439; 2 Jarman on Wills, c. 27, *12, and notes x, y. The devise is defeated and the

gift becomes a part of the residuary estate of the testator and goes to his residuary legatee: *Mills v. Newbery*, 1 N. E. Rep. 157.

IF THERE IS NO RESIDUARY LEGATEE named in the will, then the property vests in the testator's heirs at law: *Mills v. Newbery*, 1 N. E. Rep. 157; *Waring v. Waring*, 17 Barb. 553. This is true also upon a failure of the devisee to comply with a condition which is valid: *Birdsall v. Hewlett*, 19 Am. Dec. 293. In cases where the condition is a valid condition, but the party by whom it is to be performed is ignorant of the condition, and while thus ignorant breaks it, it is to be treated the same as if it had been impossible: *Merriam v. Wolcott*, 61 How. Pr. 377. Where a bequest is made upon condition, and in case of a failure to perform the condition there is a bequest over, the latter becomes operative upon the default, but in cases where there is no gift over, the condition is treated as if it had not been imposed: *Story's Eq. Jur.*, sec. 287; *Pomeroy's Eq. Jur.*, sec. 933, note 2, p. 439.

CONDITIONS THAT ARE REPUGNANT TO ESTATE to which they are annexed are absolutely void. If a testator makes an absolute gift of the property, and then proceeds to qualify the gift in a manner incompatible with an absolute ownership, the condition is nugatory: 2 *Jarman on Wills*, c. 27, subd. 2, *14.

IF ABSOLUTE DEVISE BE MADE WITH CONDITION that at death of the devisee the remainder, if any, shall go to other persons, the limitation is inoperative, because it is inconsistent with the prior devise, and no title will vest in the latter person: *Wend v. Gray*, 78 Mo. 59; *Finley v. Bent*, 95 N. Y. 364; *Kelley v. Mains*, 135 Mass. 231.

DEVISE UPON CONDITION is not barred by the lapse of time when the condition has no time for its performance annexed: *Page v. Whidden*, 59 N. H. 507. It may therefore be performed at any time, and the devise will vest in the devisee immediately upon the performance of the condition.

WHERE IT APPEARS THAT SOLE MOTIVE OF MAKING DEVISE of real property was that the legatee should perform a certain act as a condition precedent, the devise will lapse upon the condition becoming impossible of performance, and no title will vest in the devisee or his heirs: *Lester v. Rowland*, Phill. Eq. 144, citing, approving, and distinguishing the principal case; see also 2 *Jarman on Wills*, c. 27, *13, and notes c, f, g, h, 13, and 14.

IF CONDITION IS SUBSEQUENT, the estate vests in the donee immediately after the will takes effect: *Carter v. Carter*, 39 Ala. 579; see also 2 *Jarman on Wills*, p. 524, note 11. If it is a bequest of personalty, the vesting is absolute: *Waters v. Tazewell*, 9 Md. 309. If it is a devise of realty, the title will divest upon the happening of the contingency: *Avelyn v. Ward*, 1 Ves. 420. But if the condition subsequent becomes impossible, then the title does not divest, but becomes absolute; as, for instance, a testator bequeathed certain property to K., on condition that K. should marry a daughter of testator's sister T. T. had no daughter, hence the condition was not capable of being performed. Such a condition is a condition subsequent, and the devise vests in the donee at the testator's death, and does not divest: *Finley v. King's Lessee*, 3 Pet. 246; *Martin v. Ballou*, 13 Barb. 120, where the subject is fully discussed by the court. M. devised his farm to his wife for life, the real estate to go to J. M. at the death of the wife, if any of it should remain at that time, provided J. M. maintains and provides for her decently from the proceeds of the farm, or otherwise; and "provided the said J. M. fails to provide for her, then she is empowered to call on selectmen to provide for her in her own house." The will also provided that J. M. be allowed to use the farm for the purpose of

maintaining himself and testator's wife by farming the same: it was held that J. M. took upon a condition subsequent, and if he failed to perform such condition, the heirs, or residuary devisees, had the right to create a forfeiture by an entry for that purpose, although the will did not contain a clause of that purport: *Birmingham v. Lesan*, 1 Atlantic Rep. 151 (Me.); see also *Springer's Appeal*, 2 Id. 855 (Pa.). A testator gave land to A upon the express condition that A should pay to B five hundred dollars before April 1st next after testator's death: it was held not to be a condition precedent; that B had only an equitable interest in the land: *Casey v. Casey*, 55 Vt. 518. A testator devised all his property to a son. In a codicil he directed that if the son died without leaving issue living, any portion of the estate remaining should go to other relatives of the testator. By a later codicil, he directed that the son should not come into possession until he should be twenty-five years of age. The son became twenty-five years old, came into possession of the estate, and then died without issue; it was held that the title vested in him, and the property went to his heirs, and not to the relations of deceased named in the second codicil: *Kelley v. Mains*, 135 Mass. 231. No express words are required to make a condition subsequent or precedent, but the wish of the testator is to be followed in that regard, if it can be ascertained.

WHITLEY v. FOY.

[6 JONES'S EQUITY, 24.]

MONEY DEPOSITED IN BANK BY AGENT AS ORDINARY DEPOSIT, the agent stating that it was his principal's money, but desiring the officer to place it to his credit on the books of the bank, alleging that he might have occasion to use it for the benefit of his principal, may be followed by the principal in a court of equity.

BILL in equity by the personal representatives of a deceased principal, to obtain a decree against the personal representatives of his deceased and insolvent agent, for the payment to the plaintiffs of the money in controversy. Defendants' intestate, Oliver, was the agent of the plaintiffs' testator, Jones. Oliver deposited one thousand dollars in bank, stating that it was the money of his principal, Jones, but that he wanted it placed to his own credit on the books of the bank, as he might have occasion to use it for the benefit of his principal. Oliver soon afterwards died, and his principal, Jones, made a demand for the money on the officers of the bank, but was refused payment. Plaintiffs' counsel admitted that the deposit was not a special one, but that the money was mingled with the other moneys of the bank. The bank was made a party defendant.

J. W. Bryan, for the plaintiffs.

Hubbard, for the defendants.

By Court, BATTLE, J. The claim of the plaintiffs to the funds in controversy is clearly sustained both by reason and authority. This contest being between the personal representatives of a principal and agent for an amount of money which the agent had received for the principal, which he always admitted to belong to the principal, the latter certainly has the right to claim what is conceded to be his own, so long as he can identify it. This proposition is too plain to be denied, but the counsel for the defendant Foy, the administrator of the agent, insists that the money cannot be identified, because it was deposited in bank as an ordinary and not a special deposit, to the credit of the agent, and that it thereby became the money of the agent, and he at the same time became the debtor of the principal for the amount. That cannot be, because it was deposited expressly as the money of the principal, and not of the agent, and was placed by the latter to his own credit, solely for the purpose of enabling him to pay it with more convenience to his principal, or apply it to his use.

Such being the state of the case, the rule applicable to it is, that "a principal, in all cases where he can trace his property, whether it be in the hands of the agents or of his representatives or assignees, is entitled to reclaim it, unless it has been transferred *bona fide* to a purchaser of it or his assignee, for value, without notice. In such cases, it is wholly immaterial whether the property be in its original state or has been converted into money, securities, negotiable instruments, or other property, if it be distinguishable and separable from the other property or assets, and has an ear-mark or other appropriate identity: *Taylor v. Plummer*, 3 Mau. & Sel. 562; *Veil v. Mitchel*, 4 Wash. C. C. 105; *Jackson v. Perkins*, 3 Mason, 232; *Scott v. Surman*, Willes, 400; *Whitecomb v. Jacot*, 1 Salk. 166; *Jackson v. Clark*, 1 You. & Jer. 216." The above extract is from the case of *Overseers of the Poor of Norfolk v. Bank of Virginia*, 2 Gratt. 544, in which it was held that the plaintiffs were entitled to money deposited to his own credit by their agent, he having soon after died insolvent. The same principle, which is that of following a fund in equity, is clearly settled by several decisions in our state. See *Black v. Ray*, 1 Dev. & B. Eq. 433; *Bateman v. Latham*, 3 Jones Eq. 35; and *Wood v. Reeves*, 5 Id. 271.

The plaintiffs are entitled to a decree for the amount claimed. Decree accordingly.

RIGHT OF PRINCIPAL TO DEPOSIT MADE BY AGENT IN OWN NAME.—It is well settled, as a general rule of the law of banking, that the relation between a bank and its depositor, as it respects general deposits, is merely that of debtor and creditor: See *In re Franklin Bank*, 19 Am. Dec. 413, and note; *Bank of Republic v. Millard*, 10 Wall. 152; *Etwa Nat. Bank v. Fourth Nat. Bank*, 46 N. Y. 82; S. C., 7 Am. Rep. 314; and not that of trustee and *cestui que trust*: *Re Bank of Madison*, 5 Biss. 515; *Buchanan etc. Co. v. Woodman*, 1 Hun, 639; *Planters' Bank v. Union Bank*, 16 Wall. 483. But the principal case is cited in *Van Alen v. Am. Nat. Bank*, 52 N. Y. 9, in support of the rule that when an agent deposits in a bank to his own account, the proceeds of property sold by him for his principal, under instructions thus to keep it, a trust is impressed upon the deposit in favor of the principal. See also, to same effect, *Farmers' etc. Bank v. King*, 57 Pa. St. 202. The money deposited, if held by the depositor in a fiduciary capacity, does not change its character by being placed to his credit in his bank account, and the person for whom he held the money can follow it: *Knatchbull v. Hallett*, L. R. 13 Ch. D. 696; equity regards the beneficial ownership, and when the trustee mixes the trust money with his own, so that it cannot be distinguished what particular part is trust money and what part is private money, equity will follow the money by taking out the amount due the *cestui que trust*: *Id*; *National Bank v. Insurance Co.*, 104 U. S. 54; *Harrison v. Smith*, 83 Mo. 210; S. C., 53 Am. Rep. 571; disapproving *Mills v. Post*, 76 Mo. 426. Nor is the right of the beneficiary to the deposit affected by the fact that the agent or trustee, instead of depositing the identical moneys received by him on account of his principal or *cestui que trust*, substitutes other moneys therefor: *Van Alen v. Am. Nat. Bank*, 3 Lana. 517; S. C., 52 N. Y. 1; *Diebrow v. Mills*, 2 Hun, 132; the identity of a sum of money does not consist of the pieces of coin, but in the fund, which may be followed as long as its identity can be traced: *Id*.

As a general rule, if the trustee or agent convert the subject of his trust or agency into money, and pay the same in due course of business, in discharge of his own indebtedness, to one ignorant of the nature of his title, the payee acquires a perfect and indefeasible title as against the real owner, and the right to follow the money by the principal is gone: *Charlotte Iron Works v. American Exchange Nat. Bank*, 34 Hun, 26; and see *Stephens v. Board of Education*, 79 N. Y. 183. Thus in *Wood v. Boylston Nat. Bank*, 129 Mass. 358, plaintiff was owner of a negotiable note, indorsed in blank by the payee, and he sought to recover of the defendant the avails of the note. Before it fell due he delivered it to one Jackson, an attorney at law, for collection, who deposited it without his own indorsement to the defendant bank. At the time of its maturity and payment, Jackson was owing the bank more than the amount of the note. Nothing was said when it was deposited, or before its payment, as to Jackson's title or relation to the note, and no advance of money was made to him on account thereof. It was held that the plaintiff could not follow the proceeds in the hands of the defendant bank, and a recovery was defeated.

BLACKNALL v. PARISH.

[6 JONES'S EQUITY, 70.]

INSTRUMENT IN WRITING, SIGNED AND SEALED BY OWNER OF LAND, with blanks as to the name of the bargainee, and left with an agent authorized by parol to fill the blanks with the name of the purchaser, and the price, though ineffectual as a deed, may be specifically enforced as a contract for the sale of land, signed for the person to be charged therewith by his lawfully authorized agent.

AGENT MAY SIGN MEMORANDUM OF CONTRACT IN NAME OF PRINCIPAL, so as to comply with statute of frauds, though not authorized thereunto in writing.

BILL in equity for specific performance of contract, evidenced by imperfect deed. The head-note and opinion sufficiently show the point.

Norwood, for the plaintiff.

Graham, for the defendant.

By Court, **BATTLE, J.** Upon examination of the testimony taken in this cause, we are entirely satisfied that the land mentioned in the pleadings was contracted to be sold to the plaintiff by an authorized agent of the defendant; that the authority under which the agent acted was by parol, and that the contract was entered into by the agent's filling up certain blanks in an instrument, which the defendant had signed and sealed, and left with the agent to be by him made complete by filling up such blanks and delivering it as the deed of the defendant to the person who should become the purchaser. We are further satisfied that what was intended to be a sale was made fairly, and for a price which, at the time, was not inadequate, and further, that the price was subsequently received by the defendant.

It has been properly admitted by the plaintiff that the instrument which was delivered to him by the agent of the defendant as a deed for the land in question could not operate as such, because it was not complete when it was signed and sealed by the defendant. In the case of *Davenport v. Sleight*, 2 Dev. & B. L. 381, and again in *Graham v. Holt*, 3 Ired. L. 300, it was held that an instrument signed and sealed in blank, and handed to an agent only verbally authorized to fill up the blank and deliver it, was not the bond of the principal, and that after declarations of the principal approving of the delivery by the agent, made in the absence of the instru-

ment, and without any act in relation to it, would not amount to an adoption and ratification of the delivery.

The case before us is one of a deed for land, instead of a bond for the payment of money, but the principle is the same. The instrument must be complete before it can be delivered by an agent, acting under a mere parol authority, as the act and deed of his principal.

The plaintiff, not being able to set up a legal title under the instrument in question, insists, nevertheless, that it is evidence of a contract, the specific performance of which he has a right to have enforced in a court of equity. The defendant objects to this, and relies, in support of his objection, upon the statute of frauds, which declares "that all contracts to sell or convey any lands, etc., shall be void and of no effect unless such contract, etc., or some memorandum or note thereof, shall be put in writing, signed by the party to be charged therewith, or by some other person by him thereunto lawfully authorized," etc.: Rev. Code, c. 50, sec. 11. The question, then, is: 1. Whether the contract for the sale of the land was put in writing; and 2. Was it signed by the party to be charged therewith, or by any person by him thereto lawfully authorized? We think that there can be no doubt that the instrument, which for the reasons above stated could not operate as a deed, may be regarded as a contract put in writing. It is in truth a written contract more than ordinarily complete, both in form and substance, and the only question admitting of any sort of doubt is, whether it has been signed by the defendant, or by any legally authorized agent. We are of opinion that it cannot be considered as a contract with the plaintiff, signed by the defendant himself, independently of any act of his agent, because, when the defendant put his name and seal to it, no such contract had been made. But we think that, in legal effect, it was signed for him, and in his name, by his properly constituted agent. The failure of the agent to make the instrument operate as the deed of his principal did not prevent him from causing it to operate as the simple contract of his principal; for nothing is more common than for an agent to fill up blanks in a promissory note signed by his principal, and nobody has ever doubted that the principal was bound by it. That the authority of the agent, in all such cases, may, under the statute of frauds, be by parol, is well settled: 1 Parsons on Cont. 42; 2 Kent's Com. 612; *Coles v. Trecothick*, 9 Ves. jun. 250.

The plaintiff is entitled to a decree for a specific performance, and also to recover back all the costs which he has been compelled to pay in the action of ejectment at law, and also the costs which he has had to pay upon the dissolution of the injunction in the court of equity below; to ascertain which, an account may be ordered.

Decree accordingly.

REQUIREMENTS OF MEMORANDUM TO TAKE CASE OUT OF STATUTE OF FRAUDS: See *McConnell v. Brillhart*, 65 Am. Dec. 661, and note; *Old Colony R. R. Corp. v. Evans*, 66 Id. 394; *Johnson v. Brook*, Id. 547.

DEED EXECUTED BY DEFENDANT IS SUFFICIENT MEMORANDUM, under the statute of frauds, though not delivered, to support a decree for specific performance of a contract to exchange lands: *Parrill v. McKinley*, 58 Am. Dec. 212.

AGENT AUTHORIZED BY PAROL may execute contract for sale of land: *Worrall v. Munn*, 55 Am. Dec. 330; *Curtis v. Blair*, 59 Id. 257; *Paine v. Tucker*, 38 Id. 255, and note. But authority to fill blanks in deed cannot be conferred by parol: *Williams v. Crutcher*, 35 Id. 422; *Ingram v. Little*, 58 Id. 553, note.

CLARK v. LAWRENCE.

[6 JONES'S EQUITY, 88.]

EQUITY WILL GRANT INJUNCTIVE RELIEF, whenever it can be clearly proved that a place of sepulture is so situated that the burial of the dead there will endanger life or health, either by corrupting the surrounding atmosphere, or the water of wells or springs.

WHERE AN ACT COMPLAINED OF WAS OF CHARACTER OF NUISANCE, but the testimony was insufficient to satisfy the court that it amounted to such in the particular case, the supreme court directed an issue to be tried in the superior court of law to decide the fact.

BILL in equity to restrain defendant from permitting interments in a church-yard adjoining plaintiff's lot, on which his dwelling-house was situated. The plaintiff alleged in his bill that the use of the church-yard as a cemetery exposed himself and family to the effluvia arising from decaying bodies, by which the health of his family and the value of his lot would be irreparably injured; and also further alleged that the quality of the water in his wells had been so impaired by their close proximity to the graves as to render them unfit for use. There was evidence to show that the water in the plaintiff's wells, though formerly good, was, at the time of suit, very bad.

Rodman, Shaw, and J. H. Bryan, for the plaintiff.

Donnell, for the defendant.

By Court, BATTLE, J. The jurisdiction of the court of equity to restrain, by an injunction, the erection or continuance of a nuisance, either public or private, which is likely to produce irreparable mischief, is well established. It is equally well settled that the destruction of or injury to the health of the inhabitants of a city or town, or of an individual and his family, is deemed a mischief of an irreparable character. In the case of a city or town, where the apprehended injury is clearly proved, the court will not hesitate to grant the injunction, even against the erection or continuance of a water grist-mill, though such mills are generally deemed of public benefit, and the building of them has been encouraged and protected by our statute law. See *Attorney-General v. Hunter*, 1 Dev. Eq. 12; *Attorney-General v. Blount*, 4 Hawks, 384. In the case of a private nuisance, caused by a mill-pond, the court will interfere indeed, but with more caution and hesitation, both because the public benefit arising from the mill is opposed to the private interest of an individual, and because, where the land of the individual is overflowed, as in most cases it will be, and the damages assessed by a jury therefor, exceed twenty dollars, the party may, at law, by repeated actions, compel an abatement of the nuisance: *Eason v. Perkins*, 2 Dev. Eq. 38; *Barnes v. Calhoun*, 2 Ired. Eq. 199. See also *Spencer v. London and Birmingham R. R. Co.*, 8 Sim. 193.

The same principle which would excite into activity the restraining power of the court, where the health of the community, or of an individual member of it, is in danger of being destroyed or impaired by a mill-pond, will be equally ready to interpose its protection, when a similar danger is threatened from the establishment of a cemetery in a city or town, or very near the dwelling-house of a private person. This, we think, was recognized in the case of *Ellison v. Commissioners of Washington*, 5 Jones Eq. 71, though the decision in that case, on account of its peculiar circumstances, was averse to the application for the injunction. In cases of this kind, the plaintiff will not have to encounter the difficulty that a place for the burial of the dead, within the limits of a city or town, or near the residence of a private person in the country, is considered a matter of public weal. On the contrary, the public sentiment is already, or is becoming to be, in favor of more secluded spots, where we, like the patriarch of old, "may bury our dead out of our sight." Whenever, then, it can be clearly proved that a place of sepulture is so situated that the burial of the

dead there will endanger life or health, either by corrupting the surrounding atmosphere, or the water of wells or springs, the court will grant its injunctive relief upon the ground that the act will be a nuisance of a kind likely to produce irreparable mischief, and one which cannot be adequately redressed by an action at law. In the present case, the evidence upon which the cause has been brought before us for a hearing does not so clearly satisfy us of the fact of a nuisance either existing or apprehended as will justify us in granting an injunction without further inquiry. Under such circumstances, the usual course is to require the party to establish his allegations of a nuisance by an action of law: *Simpson v. Justice*, 8 Ired. Eq. 115, and the cases there cited. That course would be most appropriate, and would be adopted by us, if, as was said in *Attorney-General v. Hunter*, 1 Dev. Eq. 12, "the right infringed were of a doubtful character, as the right of view over another's ground." But in a case like the present, where the thing complained of is certainly of the character of a nuisance, and the only doubt is, whether the testimony proves that it is so in the particular case, we think that we can accomplish the same purpose in a manner more convenient to the parties, and quite as satisfactory to ourselves, by directing an issue to be tried in the superior court of law for Pitt county, whether the burial of the dead in the church-lot mentioned in the pleadings has produced, or if continued is likely to produce, sickness in the plaintiff's family, or to impair their comfort, either by corrupting the air or the water in his wells. Let an order be drawn accordingly.

Decree accordingly.

INJUNCTION AGAINST NUISANCE, when granted: *Coker v. Birge*, 54 Am. Dec. 247, and note; *Wolcott v. Melick*, 66 Id. 790.

CASES AT LAW
IN THE
SUPREME COURT
OF
NORTH CAROLINA.

OVERTON v. CRANFORD.

[7 JONES'S LAW, 415.]

STRANGER CANNOT TAKE ADVANTAGE OF MERE IRREGULARITIES in service of notice of administrator's sale, to defeat the purchaser's title.

PURCHASER AT ADMINISTRATOR'S SALE WILL BE PROTECTED where the warrant for selling is regular on its face, and issues from a court of competent jurisdiction.

IT IS IRREGULAR FOR ADMINISTRATOR, WHO IS ALSO SHERIFF, TO SERVE NOTICE of sale of estate on the heirs, but such irregularity cannot be inquired into collaterally, and the court may correct it.

EJECTMENT. Plaintiff was a purchaser at an administrator's sale. The administrator was also the sheriff, and as such served the notices of the sale in the cause upon the heirs at law, and made the returns in his own name as sheriff. The court held that the service was void, and that the deed from the administrator was also void, in consequence of the void service, and therefore vested no title in the purchaser. Verdict for defendant, and plaintiff excepted.

Blackmer and J. H. Bryan, for the plaintiff.

Fowle, for the defendant.

By Court, MANLY, J. The case states, the plaintiff attempted to show title through Burgess Goings, by proceedings on the part of his administrator, A. H. Saunders, to make the real estate assets. It seems there was a petition, and copies with notices served upon the heirs by A. H. Saunders, who was, at the time, sheriff, and a decree for a sale, appointing Saunders

commissioner to sell. Two irregularities are noted in the proceeding, and for these, it was objected in the court below, that the sale, under the proceedings, was void. The court sustained these objections, and this evidence of title was excluded. How far, or in what respect, this ruling affected the controversy (that is the boundary between the parties), we are not enabled to see, but suppose from its insertion, it had a material bearing. In this ruling, we think there is error.

Neither of the parties to this controversy was a party to the petition for the sale, or in any way interested in it; and we are of opinion a mere stranger cannot go behind the decree of sale and take advantage of the irregularities noted, to defeat the rights of the purchaser. The order, which is the commissioner's warrant for selling, being regular on its face, and issuing from a court of competent jurisdiction, the purchaser ought to be protected; otherwise, all confidence in judicial sales will be lost, and the free and perfect competition for property on such occasions, essential to the rights of all parties, entirely subverted.

It may be remarked with regard to the first of the defects mentioned in the case, that neither as administrator in preferring the petition, nor as sheriff in serving the notices, does Saunders act *proprio jure*, but in both he is the minister of the law. There is not, therefore, in his conduct, strictly speaking, the inconsistency of acting as ministerial officer in his own cause. It is an irregularity which the court might have corrected, upon exception, pending the proceedings, but it cannot be inquired into collaterally. And, with respect to the objection that no affidavit of the facts of the petition was made, it would have been corrected upon the motion of any party in the cause, while it was pending, but the decree of sale cannot now be annulled therefor, upon the motion of a stranger.

The object of calling in the parties in interest is to guard the court from acting against law to the injury of any one, and everything of form, as well as substance, is supposed to be done, or waived, until the contrary be established by proper proceedings instituted for the purpose. These principles seem to be fully settled in the case of a constable's levy on land returned to court. A sale made in pursuance of an order from the court, in such a case, cannot be impeached collaterally, although it did not appear from the constable's return there were no goods and chattels, and although no notice was given to the owner: *Jones v. Austin*, 10 Ired. L. 20.

The able judge who tried the case below had, as we suppose, the case of *Leary v. Fletcher*, 1 Ired. L. 259, in his mind, where it is decided that an order made for the sale of an orphan's land by the county court, on the motion of the guardian, was void for certain irregularities in the proceedings. The cases may be distinguished. In *Leary v. Fletcher*, *supra*, the decree, or order of sale, which constituted the sheriff's warrant was contrary to the requirements of the law in this: no particular property was specified, but the sheriff required to sell so much as might be sufficient, whereas the law requires the court to designate. The order upon its face was outside of the court's power, and was consequently void. Not so in the case now before us.

We have not thought proper to discuss the point of evidence raised on the question of boundary, as it becomes unnecessary to do so from the view taken of the other points, and because, upon a second trial, it may possibly be eliminated altogether from the case by the introduction of the title excluded upon the former trial. In excluding this title, derived from the administrator's sale, there was error, and for this, there must be a *venire de novo*.

Judgment reversed.

IRREGULARITIES IN EXECUTION SALES, when and by whom they may be taken advantage of: See *Phillips v. Coffey*, 63 Am. Dec. 357, and collected cases in note to same 361. Mere irregularities in probate proceedings do not invalidate them, if the court acquired jurisdiction: See note to *Dancy v. Stricklands*, 65 Id. 185; and cases cited in note to *Burns v. Hamilton's Adm'r*, 70 Id. 581.

PURCHASER AT ADMINISTRATOR'S SALE OF REAL ESTATE, WHEN PROTECTED: See *Lynch v. Baxter*, 51 Am. Dec. 735, and note 746; note to *Alexander's Heirs v. Maverick*, 67 Id. 693.

WHITEHURST v. NORTH CAROLINA MUT. INS. CO.

[7 JONES'S LAW, 422.]

"FORTHWITH" MEANS IMMEDIATELY IN ALL INSURANCE POLICIES REQUIRING the assured to give notice of loss forthwith; and notice twenty days after is not a compliance with the requirement.

COVENANT on an insurance policy. Plaintiff's building, insured by defendant, was burned. Twenty days afterwards plaintiff notified the company of the loss. There was a requirement in the policy that such notice should be given forthwith, and the company refused to pay; whereupon plaintiff

brought suit. The court held the notice to have been given in time, and gave judgment for plaintiff. Defendant appealed.

Stevenson and Green, for the plaintiff.

J. W. Bryan and Haughton, for the defendant.

By Court, PEARSON, C. J. We differ from his honor upon the first point made by the defendant. The affidavit, etc., furnished by the plaintiff, and forwarded to the secretary of the company, was not, in the opinion of this court, a full compliance with the condition of the policy, which requires "all persons sustaining loss or damage by fire, forthwith to give notice thereof to the secretary, and within thirty days after the loss to deliver a particular account of such loss or damage, signed with their own hands, and verified by oath or affirmation," etc. This condition imposes two duties; the latter was complied with, but the former was not, and consequently the plaintiff was not entitled to recover, according to the decision in *Woodfin v. Asheville Ins. Co.*, 6 Jones L. 558.

The first or general notice is required to be given "forthwith," to enable the company, as soon after the loss as practicable, to institute proper inquiry; and the second, or particular notice, within thirty days. It was not proved that any notice was given until after the expiration of some twenty days. This, certainly, does not satisfy the word "forthwith," which must be construed, considering the purpose for which it is required, to mean immediately, or within reasonable time; and under the circumstances the rule which has been adopted in regard to bills of exchange, *i. e.*, on the same day, if in the same town, or else by the next mail, would seem to furnish a fit analogy. As this point is decisive, we will not enter upon the other, especially as the statement made up by his honor, and his charge in reference to it, are not so clearly set out as to enable us to see that we understand it. There is error. *Venire de novo*.

Judgment reversed.

WHERE, BY CONDITIONS OF POLICY OF INSURANCE, NOTICE OF LOSS IS REQUIRED TO BE GIVEN FORTHWITH, it is only necessary that such notice be given with due diligence under all the circumstances of the case: *St. Louis Ins. Co. v. Kyle*, 49 Am. Dec. 74; but a delay of eleven days is not a compliance with the contract, and where no reasonable excuse is given for such delay, the insurer is discharged from liability: *Tresh v. State Fire etc. Ins. Co.*, 73 Id. 622.

STATE v. WILLIAMS.

[7 JONES'S LAW, 446.]

TO IDENTIFY CHARRED BONES AS THOSE OF MISSING WOMAN SUPPOSED TO HAVE BEEN MURDERED, it is competent to show that certain hair-pins were found with the bones, and that the woman was in the habit of wearing such pins two or three years before.

CORPUS DELICTI MAY BE PROVED BY PRESUMPTIVE OR CIRCUMSTANTIAL EVIDENCE, but it must be strong and cogent.

INDICTMENT FOR MURDER IS SUFFICIENT, where it charges that the murder was done "in some way and manner, and by some means, instruments, and weapons, to the jury unknown."

INDICTMENT for murder. The bill charged that defendant and another did make an assault and in some way and manner, and by some means, instruments, and weapons to the jurors unknown, did then and there feloniously, willfully, and of their malice aforethought, deprive her, the said Peggy Hilton, alias Peggy Isly, of life, etc. The other facts necessary to an understanding of the points raised are sufficiently stated in the opinion.

William A. Jenkins, attorney-general, and McLean, for the state.

Morehead, for the defendant.

By Court, BATTLE, J. On his trial, the prisoner made two objections to the admission of testimony, which were overruled, and prayed an instruction to the jury, which was refused, all which are set forth in his bill of exceptions as the grounds of his application to have the judgment against him reversed, and a *venire de novo* awarded. He has also submitted a motion that, if another trial be refused him, the judgment shall be arrested for an alleged insufficiency of the indictment.

In order to understand the pertinency of the objections to the testimony, as well as that of the instruction which was prayed, it is necessary to observe that every criminal charge involves two things: 1. That an offense has been committed; and 2. That the accused committed it. In the present case, neither of these things could be proved by direct or positive testimony, so that it became necessary on the part of the prosecution to resort to circumstantial or presumptive evidence for the purpose of establishing both. After the finding of what were alleged to be the charred bones of a human being in the ashes of the log pile, and in the creek, it became all important to identify them, if possible, as parts of the remains

of the supposed deceased, Peggy Isly. The first testimony objected to was offered to show that certain hair-pins which were found among the bones in the creek belonged to her, and with that view it was proposed to prove that she was in the habit of wearing such pins. No objection was or could be offered to the proof that the pins were found, and we presume that none would have been made to a statement that she had such in her hair when she left home. But as the witnesses could not testify to that fact, the point of the objection was to the proof that she had been in the habit of wearing them sometime before, and particularly for so long a time as two years before the time when she was last seen.

The objection, it will readily be perceived, applies more against the force than the competency of the testimony. The fact, if it had been so, that the hair-pins formed a part of her head-dress when she left home, might have been proved as one, in a chain of circumstances, to show that the human bones found in the creek were those of a female, and that that female was probably the supposed deceased. The testimony actually offered and given tended to prove, though with less strength, the same thing, and it was therefore pertinent and natural. There can be no doubt that it was open to the prisoner to reply to this testimony, and to prove, if he could, that the supposed deceased had never worn hair-pins, for the purpose of negating the inference that the remains were hers.

The testimony offered to show the proper season for burning plant-beds for tobacco, and the manner in which the prisoner usually prepared his, had too obvious a tendency to connect him with the transaction relative to the burnt human bones, to require much comment. That it had such a tendency, no one can deny; and that, of itself, makes it competent as a circumstance which may, with others, coil around the prisoner, and fasten him to the guilty deed: See *State v. Bill*, 6 Jones L. 34.

The question raised by the instruction, which the prisoner requested the court to give to the jury, is one of much more importance than those which we have already considered, and has been attended with more trouble in the discussion and decision of it. The instruction prayed and refused was "that there was no evidence in the case identifying the bones and pins found as being part of the bones and apparel of the deceased." In support of the propriety of his prayer, the counsel for the prisoner contends that, if it were admitted that

the bones found in the log-pile, the beech stump, and the creek were those of a human being, there is no part of the testimony which shows, from any particular mark about them, or relating to them, that they were the bones of the supposed deceased more than any other dead body; and that, in this respect, the case differs essentially from that of *Rex v. Clewes*, 4 Car. & P. 221, S. C., 19 Eng. Com. L. 354, where the body of a man was, after lapse of twenty-three years, identified by his widow from some peculiarity about his teeth; and also from that of the celebrated case of *Commonwealth v. Webster*, 5 Cush. 295 [52 Am. Dec. 711], where the remains of Dr. Parkman were identified from a similar cause by a dentist. Assuming that there was no such testimony given on the trial, the counsel insists upon it, as an established rule of law, that the *corpus delicti* must be proved by direct or positive testimony before the accused can be convicted of the offense charged against him.

The authorities upon which the counsel relies in support of his position are Lord Chief Justice Hale and Lord Stowell. In 2 Hale P. C. 290, the learned author says: "I would never convict any person of murder or manslaughter, unless the facts were proved to be done, or at least, the body found dead." Lord Stowell, in pronouncing his celebrated judgment in *Evans v. Evans*, 1 Hagg. Con. 105, said: "When a criminal fact is ascertained, presumptive proof may be taken to show who did it—to fix the criminal, having there an actual *corpus delicti*; but to take presumptions in order to swell an equivocal and ambiguous fact into a criminal fact, would, I take it, be an entire misapprehension of the doctrine of presumptions." So Mr. Starkie, in his valuable work on evidence, see 1 Stark. Ev., 3d ed., 575, lays it down as an established rule, "that upon charges of homicide, the accused shall not be convicted unless the death be first distinctly proved, either by direct evidence of the fact, or by inspection of the body." Mr. Best, in his treatise on the principles of evidence, thinks that the language of these eminent authorities is too broad, and that the general principle which they lay down must be taken with considerable limitation. After noticing that, in some offenses, the evidence establishing the existence of the crime also indicates the criminal, while in others the traces or effects of the crime are visible, leaving the author of it undetermined, he proceeds to remark thus of the latter: "In most cases, the proof of the crime is separable from that of the criminal. Thus the finding of a dead body, or a house in ashes, may

indicate a probable crime, but do not necessarily afford any clue to the perpetrator. And here, again, a distinction must be drawn relative to the effect of presumptive evidence. The *corpus delicti*, in cases such as we are considering, is made up of two things: 1. Certain facts forming its basis; and 2. The existence of criminal agency as the cause of them. Now, it is with respect to the former of these that the general principles of Lord Stowell and Sir Matthew Hale especially apply, and it is the established rule that the facts which form the basis of the *corpus delicti* ought to be proved, either by direct testimony, or by presumptive evidence of the most cogent and irresistible kind." See Best on Principles of Evidence, 321; 66 Law Lib. 205-206.

The admission of proof of the *corpus delicti* by presumptive evidence of any kind is manifestly a qualification of the strict rule laid down by the great judges whose remarks we have quoted. This qualification of the rule is contended for by the celebrated Jeremy Bentham, who says: "Were it not so, a murderer, to secure himself with impunity, would have no more to do but to consume or decompose the body by fire, by lime, or by any other of the known chemical *menstrua*, or to sink it in an unfathomable part of the sea:" 3 Smith's Jud. Ev. 234. Mr. Best states in a note to page 323 of his work, that he believed that eminent judge, Baron Rolfe, afterwards Lord Chancellor Cranworth, had instructed a grand jury that the rule excluding presumptive evidence of the basis of the *corpus delicti* was not universal. Such, too, seems to have been the opinion of Best, J., in the elaborate opinion which he gave in the case of *King v. Burdett*, 4 Barn. & Ald. 95; S. C., 6 Eng. Com. L. 358. In speaking of presumptive evidence, he says: "Until it pleases Providence to give us means beyond those our present faculties afford of knowing things done in secret, we must act on presumptive proof, or leave the worst crimes unpunished. I admit, where presumption is attempted to be raised as to the *corpus delicti*, that it ought to be strong and cogent." The same view of the rule is taken by the later writers on the subject, and we adopt it as the correct one: See Wills on Circumstantial Evidence, 204; 41 Law Lib. 85; Wharton's Am. Crim. L., sec. 747. We hold, therefore, that his honor committed no error in refusing to give the instruction as prayed, and we cannot discover anything in the charge which he did give of which the prisoner has any just cause of complaint.

The motion for the reversal of the judgment and the grant of a *venire de novo* is overruled, and that brings up for consideration the motion for an arrest of the judgment. This is founded upon the alleged insufficiency of the indictment, and the objection to it is the means, whereby the homicide is charged to have been committed, are stated to be to the jurors unknown. The indictment is substantially, if not literally, the same with the fourth count of the indictment against Dr. Webster, which, after argument and mature deliberation, was sustained by the judgment of the supreme judicial court of Massachusetts: See *Commonwealth v. Webster*, 5 Cush. 296 [52 Am. Dec. 711]. If the person killed be a stranger, it is well settled that it may be charged in the indictment that his name, if the fact be so, is to the jurors unknown; and we are unable to perceive any difference in principle between such a charge and one where the instrument and means of death are in fact not known to those who are called upon to find the bill. The motion in arrest of judgment is therefore refused; and it must be certified to the superior court of law for the county of Rockingham that there is no error in the record.

Judgment affirmed.

INDICTMENT FOR MURDER MUST STATE CHARGE WITH AS MUCH CERTAINTY as the circumstances of the case will permit, but nothing more is required: *Commonwealth v. Webster*, 52 Am. Dec. 711, and note 733, referring to other cases.

PROOF OF CORPUS DELICTI.—1. DEFINITION AND GENERAL PRINCIPLES.—It has sometimes been assumed that the phrase "*corpus delicti*" means the dead body of the deceased; but the usage of the phrase in this sense is an abuse of words. The true meaning of the phrase is the body of the offense or crime; that is, the substantial fact that a crime has been committed by some one: *State v. Dickson*, 78 Mo. 447. Until the fact of a criminal death is made out, it is, of course, fruitless to inquire who was the criminal. The inquiry as to the fact of death is usually made before a coroner having jurisdiction over the locality where it occurred: 1 *Rapalje & Lawrence's Law Dict.* 300. The *corpus delicti* consists of a criminal act, and defendant's agency in its production: *State v. Dickson*, 78 Id. 438; *Smith v. Commonwealth*, 21 Gratt. 813; *People v. Bennett*, 49 N. Y. 137; *United States v. Williams*, 1 Cliff. 25; *Ruloff v. People*, 18 N. Y. 179; *Pitts v. State*, 43 Miss. 472; *People v. Jones*, 31 Cal. 565; *State v. Scott*, 39 Mo. 424; *Johnson v. Commonwealth*, 29 Gratt. 811. The fact that a criminal act has been committed constitutes the base of the *corpus delicti*: *Pitts v. State*, 43 Miss. 480.

2. EVIDENCE.—1. *Fact Forming Base of Corpus Delicti must be Proved beyond Reasonable Doubt.* This is the rule in all criminal cases, whether the doctrine requiring special directness and clearness of evidence to the fact of there having been a crime, be regarded as a rule of caution merely, or one of absolute law. The judges, in various decisions, mean, when they say that the *corpus delicti* must be proved beyond a reasonable doubt, that the criminal act

must be proved beyond a reasonable doubt before evidence can be introduced of defendant's criminal agency in connection with it: *Pitts v. State*, 43 Miss. 472; *People v. Schryver*, 42 N. Y. 1; *State v. Dickson*, 78 Mo. 438; *State v. Scott*, 39 Id. 424; *Smith v. Commonwealth*, 21 Gratt. 809; *State v. Hogard*, 12 Minn. 293; *Brown v. State*, 1 Tex. App. 154; *State v. Keeler*, 28 Iowa, 551; *State v. Davidson*, 30 Vt. 377; *People v. Jones*, 31 Cal. 565; *Black v. State*, 1 Tex. App. 368; 10 Cent. L. J. 165. It is sometimes said that the fact which constitutes the basis of the *corpus delicti* forms a distinct ingredient in the case of the prosecution, and must be established to a "moral certainty;" but "moral certainty" and "proof beyond a reasonable doubt" are synonymous terms signifying such proof as precludes every reasonable hypothesis, except that in support of which the evidence is offered: *Commonwealth v. Costley*, 118 Mass. 1, 24. It has been held that a charge which asserts that defendant is entitled to an acquittal, "unless the evidence against him is such as to exclude to a moral certainty every possible hypothesis but that of his guilt," is erroneous: *Mose v. State*, 36 Ala. 211, 231. But on the other hand, it is held that it is not sufficient, in a case of circumstantial evidence, that the circumstances proved coincide with, account for, and therefore render probable, the hypothesis of guilt. They must exclude, to a moral certainty, every other hypothesis of guilt, or the jury must acquit: *Black v. State*, 1 Tex. App. 368. In criminal cases, the prosecution is required to prove two things: 1. That a crime has been committed; 2. That it was committed by the person charged and none other. It is clear, therefore, that without some evidence tending to show that a crime has been committed, the question as to the person by whom it was committed cannot arise: *People v. Jones*, 31 Cal. 565. And the particular act which constitutes the crime must be proved: *Id.*; *State v. Scott*, 39 Mo. 424. Whether proof of the *corpus delicti* be made by direct, or circumstantial evidence, the legal test of its sufficiency is, whether it satisfies the understanding and conscience of the jury beyond a reasonable doubt: *Brown v. State*, 1 Tex. App. 154. When the *corpus delicti* is attempted to be shown solely by circumstantial evidence, it must be so established as positively to exclude all uncertainty in regard to it from the minds of the jury. But it is not necessary that each particular circumstance be of this conclusive character. The combined effect, however, of all the circumstances in the case must be such as to produce the same degree of certainty, in regard to the *corpus delicti*, as positive proof: *State v. Davidson*, 30 Vt. 377.

2. *Corpus Delicti may be Proved by Circumstantial Evidence.* Direct and positive evidence is unnecessary to prove the *corpus delicti*: *United States v. Williams*, 1 Cliff. 21, 26; *State v. Keeler*, 28 Iowa, 551; *State v. Dickson*, 78 Mo. 438; *Carey v. State*, 26 Tenn. 499. It may be proved by circumstantial evidence, if it be strong and cogent, and leave no room for reasonable doubt: See discussion of this point in a brief note to *Rippey v. Miller*, 62 Am. Dec. 184, 185; also in the principal case; *King v. Hindmarch*, 2 Leach, 569; *Regina v. Cheverton*, 2 F. & F. 833; *Brown v. State*, 1 Tex. App. 154; *State v. Dickson*, 78 Mo. 438; *McCulloch v. State*, 48 Ind. 109; *United States v. Williams*, 1 Cliff. 21; *Stocking v. State*, 7 Ind. 326; *Ruloff v. People*, 18 N. Y. 179; *People v. Bennett*, 49 Id. 137; *Wilson v. State*, 43 Tex. 472; *State v. Winner*, 17 Kan. 298; 10 Cent. L. J. 165. This rule is now clearly established, and it would be most unreasonable to always require direct and positive evidence. Crimes, especially those of the worst kind, are naturally committed at chosen times, in darkness and secrecy. Human tribunals must, therefore, act upon such indications as the circumstances of the case present or admit, or society must be broken up. The cases just cited show that the jury may find a verdict of

guilty upon circumstantial evidence, and that the *corpus delicti* may be proved by such evidence, as well as any other part of the case, and that this rule applies in cases of murder and manslaughter, as well as in all other crimes. But a few courts have, by refined distinctions, qualified this doctrine slightly. Thus in New York it was laid down, in the first instance by a divided bench, that in murder, either the death, or the criminal agency producing it, must be proved by direct evidence; then the other may be proved by circumstantial evidence: *Ruloff v. People*, 18 N. Y. 179. The same thing was held as to the crime of murder or manslaughter in *People v. Bennett*, 49 Id. 137; but the court was divided. The better rule, however, is that either element of the *corpus delicti*, or both, may be proved by circumstantial evidence, and this is the one sustained by the weight of authority as shown by the cases above cited. But circumstantial evidence should be acted upon with great caution, especially where the public anxiety for the detection of a great crime creates an unusual tendency to exaggerate facts and draw rash inferences: *Pitts v. State*, 43 Miss. 472; because of all the various sources of error, one of the most copious and fatal is an unreflecting faith in human testimony.

3. *Burden of Proof and Confessions as Proof of Corpus Delicti*.—In all criminal prosecutions, no matter what may be the kind of evidence on which they rest, whether circumstantial or direct, the burden is on the prosecution to prove the *corpus delicti*; and the people must prove it beyond a reasonable doubt: Wharton's Crim. Ev., sec. 324; *People v. Schryver*, 42 N. Y. 1; 1 Am. Rep. 480; *People v. Jones*, 31 Cal. 565. And whatever doubts may have formerly existed, it is now a well-established proposition in this country that a conviction for any of the higher crimes is not warranted where there is no other proof of the *corpus delicti* than the uncorroborated extrajudicial confession of the accused: *State v. German*, 54 Mo. 526; 8 C., 14 Am. Rep. 481, and see note thereto 486; *Stringfellow v. State*, 26 Miss. 157; *Territory of Montana v. McClin*, 1 Mont. 396; *People v. Badgley*, 16 Wend. 53; *People v. Hennessey*, 15 Id. 147; *Pitts v. State*, 43 Miss. 472; *Smith v. Commonwealth*, 21 Gratt. 809, 816; *People v. Thrall*, 50 Cal. 415; *Robinson v. State*, 12 Mo. 592; *People v. Jones*, 31 Cal. 565; *Jenkins v. State*, 41 Miss. 582; *United States v. Mulvaney*, 4 Park. Cr. 164; *Sam v. State*, 33 Miss. 347; *State v. Scott*, 39 Mo. 424. There must be proof *alimide* of the *corpus delicti*: *People v. Badgley*, 16 Wend. 53; *People v. Hennessey*, 15 Id. 147; *People v. Thrall*, 50 Cal. 415; *Pitts v. State*, 43 Miss. 472. When there is an entire want of evidence of the *corpus delicti*, except statements made by the prisoner, the court should direct the jury to acquit the prisoner: *People v. Jones*, 31 Cal. 565; *United States v. Mulvaney*, 4 Park. Cr. 164. Facts ascertained by reason of a confession may be considered in establishing the *corpus delicti*; but the *corpus delicti* must be proved independently of extrajudicial confessions, and beyond reasonable doubt; and without such proof of the *corpus delicti*, evidence of the confession is inadmissible at the trial: *Pitts v. State*, 43 Miss. 472. But where the *corpus delicti* is otherwise established, a conviction may be had on the prisoner's confessions alone, if free, voluntary, and satisfactorily proved: *Mose v. State*, 36 Ala. 211; *State v. Guild*, 5 Halst. 163; *State v. Brown*, 1 Mo. App. 86; *Sam v. State*, 33 Mich. 347; and this, although it is uncorroborated by any other evidence: *State v. Guild*, 5 Halst. 163; but it must be shown that the confession was voluntary; if not, it cannot be admitted in evidence: *Territory of Montana v. McClin*, 1 Mont. 394. If there is pregnant evidence of the *corpus delicti*, independent of defendant's confession, it will be sufficient to authorize the admission of his confession: *State v. Brown*, 1 Mo. App. 86. And where the first element of the *corpus delicti*, the criminal act, has been proved by other

evidence than the prisoner's confession, no reason is perceived why the free and voluntary confession of the party, if deliberately made, may not be sufficient to establish the other element of the *corpus delicti*, provided it satisfactorily appears that other evidence does not exist: *United States v. Williams*, 1 Cliff. 26; *Sam v. State*, 33 Miss. 347. The admissions of a prisoner as to his having committed a crime must, however, be clear and explicit. If there is any doubt as to his meaning, he ought not to be convicted: *Smith v. Commonwealth*, 21 Gratt. 809. But see in connection with this, as to admissions of guilt in one conversation, and declarations of innocence in another, *McCulloch v. State*, 48 Ind. 109. So, if a confession is not full and complete enough to prove the *corpus delicti*, the defendant ought not to be convicted unless there is other evidence to prove it: *Regina v. Sharman*, 24 Eng. L. & Eq. 553. A judicial confession, however, is sufficient to found a capital conviction upon, although uncorroborated by any independent proof of the *corpus delicti*: *State v. Lamb*, 28 Mo. 218; *State v. German*, 54 Id. 528. And this is true, whether the confession be made before a magistrate or on a plea of guilty in open court to an indictment; and though the conviction be followed by sentence of death: See case last cited; *Robinson v. State*, 12 Id. 592; *People v. Hennessy*, 15 Wend. 147. At all events, there should be no conviction in higher crimes except where the *corpus delicti* is proved with particular clearness and certainty. Judicial history, says Wills on Circumstantial Evidence, sec. 6, p. 69, presents innumerable warnings of the danger of placing implicit dependence upon extrajudicial, self-condemnatory evidence without independent proof of the *corpus delicti*, even where such evidence is exempt from all suspicion of coercion, physical or moral, or other sinister influence. "How greatly then," he says, "must such danger be aggravated, where confession constitutes the only evidence of the fact of a *corpus delicti*; and how incalculably greater in such cases is the necessity for the most rigorous scrutiny of all collateral circumstances which may actuate the party to make a false confession! The agonies of torture, the dread of their infliction, the hope of escaping the rigors of slavery or the hardships of military service, a weariness of existence, self-delusion, the desire to shield a guilty relative or friend from the penalties of justice, the impulses of despair from the pressure of strong and apparently incontrovertible presumptions of guilt, the dread of unmerited punishment and disgrace, the hope of pardon; these, and numerous other inducements, have not unfrequently operated to produce unfounded confessions of guilt." These statements, he fortifies with copious illustrations. Instances of such cases will also be found in 3 Wharton & Stillé's Med. Jur., c. 6, p. 610. In Vermont, the rule laid down that there can be no conviction of a crime upon confessions alone, without other proof of the *corpus delicti*, is held not applicable to the lower grade of crimes, such as the offense of selling liquor in violation of the statute: *State v. Gilbert*, 36 Vt. 145.

4. *Murder, Manslaughter, Homicide, etc.*—In murder, manslaughter, and all cases of intentional, voluntary homicide, the *corpus delicti* has two component elements, viz., death as the result, and the criminal agency of another as the cause: *People v. Bennett*, 49 N. Y. 137; *Ruloff v. People*, 18 Id. 179; *People v. Schryver*, 42 Id. 6; 8 C., 1 Am. Rep. 480; *Smith v. Commonwealth*, 21 Gratt. 820. The fact of the death is the fundamental and material fact to be established in these cases; and it should be shown either by witnesses who were present when the murderous act was done, or by proof of the body having been seen dead, or by proof of criminal violence adequate to produce death, and which accounts for the disappearance of the body. Expressed in another form, the body must be found, or there must be equivalent proof of

death. The proof must show that a body found is the body of the person for whose murder the prisoner has been indicted and tried. Lord Hale's sentiment in the principal case, as to the importance of extreme care in ascertaining the truth of every criminal charge, especially where life is involved, may be regarded as a rule of law; but it is a general rule and is subject to some qualification. One of these qualifications is, that in cases of murder, etc., it is not always essential that the body of the deceased should be found. The murderer may cast his victim into the sea, or consume the body by fire or chemicals. In fact, it often happens that the dead body cannot be produced, although the proof of death is clear and satisfactory. A strong case in illustration is that of a murder at sea, when the body is thrown overboard in a dark and stormy night, at a great distance from land or any vessel. Although the body cannot be found, nobody can doubt that the author of such crime is guilty of murder. In such a case, the law permits the jury to infer that death has ensued from the facts proved; the circumstances being such as to exclude the least, if not almost every probability, that such a person could have escaped with life; and yet there is a bare possibility in such a case that the person may have escaped with life. So the *Webster Case*, 52 Am. Dec. 711, which is familiar to the professional mind in this country, shows that by means of chemical *menstrua* there could be an entire immunity secured to guilt if the production of the remains be invariably insisted upon. In fact, many illustrations might be adduced to show that a murderer would have nothing more to do than to consume or decompose the body by fire, lime, or by any other of the well-known chemical *menstrua* or to sink it in an unfathomable part of the sea. In any of these ways might he effectually get rid of the body. The discovery of the body necessarily affords the best evidence of the fact of death, and of the identity of the individual, and most frequently also of the cause of death. If, however, the death in such case cannot be proved by inspection of the body, it may be proved by other evidence strong enough to leave no ground for reasonable doubt. This test is applicable to all crimes; but the fact of death must be established by clear and unequivocal proof, either by direct testimony or by presumptive evidence of the most cogent and irresistible kind. The following cases support the above statements: *Smith v. Commonwealth*, 21 Gratt. 809, 820; *Ruloff v. People*, 18 N. Y. 179, 182; *People v. Wilson*, 3 Park. Cr. 199; *Stocking v. State*, 7 Ind. 326; *State v. Brown*, 1 Mo. App. 86; *United States v. Williams*, 1 Cliff. 5; 10 Cent. L. J. 164; Burrill on Circumstantial Evidence, 679; also Wharton's Cr. Ev., sec. 324, 325; Wills on Circumstantial Evidence, sec. 3, p. 206; 3 Wharton & Stillé's Med. Jur., sec. 782, 783, in which two last authorities will be found many illustrative cases.

With respect to the question of identity, Wills and Burrill treat it as a distinct element of the *corpus delicti*, in addition to the two elements above given; but whether considered in connection with the fact of death or separately, it is a necessary step in the establishment of the *corpus delicti*, in cases of homicide and murder, that the body, when discovered, be satisfactorily identified as that of the person whose death is the subject of inquiry: Wills on Circumstantial Evidence, sec. 3, p. 212, with illustrative cases. But the identification may be made by circumstantial evidence: *Regina v. Cheverton*, 9 F. & F. 633; *State v. German*, 54 Mo. 530; S. G., 14 Am. Rep. 481; *Wilson v. State*, 43 Tex. 472. Thus, evidence of the finding of a skeleton of a human being of the sex of the person charged to have been murdered and corresponding to his size, is sufficient evidence of the *corpus delicti* to justify the admission of circumstantial evidence to identify the skeleton as that of the

murdered party, as well as to show the manner and cause of his death: *McCluck v. State*, 48 Ind. 109. As to identity of skeleton, see also *Wilson v. State*, 43 Tex. 472. It is competent to identify a dead body by means of articles found upon it; and on questions of identity, the impressions and beliefs of a witness are competent evidence: *State v. Dickson*, 78 Mo. 438; *Taylor v. State*, 35 Tex. 97. If the body be found in a state of decomposition or disintegration, it seems that at least fragments of the remains must be identified: *Commonwealth v. Webster*, 5 Cush. 295; S. C., 52 Am. Dec. 711; *Wills on Circumstantial Evidence*, sec. 3, p. 212, and cases there cited. In cases where the body is undiscovered, it would seem, upon principle, that the identity of the person might be proved by presumptive evidence, but there seems to be a want of authority to support such an unfrequent circumstance. At least, such cases are not now at hand. Circumstantial evidence of identity, however, in any case must be clear and cogent and leave no room for reasonable doubt: *State v. German*, 54 Mo. 530; S. C., 14 Am. Rep. 481; *State v. Dickson*, 78 Mo. 438. In reason, the identity of the person charged with the offense requires fully as much care as the *corpus delicti*. "The cases," says Bishop, "are numerous wherein witnesses have been mistaken on this point, or if there is to be perjury, it is upon this that it is more likely to appear. And there is no more excuse for punishing a defendant, when another has committed a crime, than when no one has:" 1 Bish. Cr. Pr., sec. 1060. This question as to the identity of the prisoner is a fundamental fact in establishing the criminal agency of another as the cause of death. The discovery and identification of a dead body or its remains as that of a person charged to have been slain establishes the basis of the *corpus delicti*, and the next step in the process, the one which serves to complete the proof of the indispensable preliminary fact, is to show that the death has been occasioned by the criminal act or agency of another person. And this may be done by circumstantial evidence: *Ruloff v. People*, 18 N. Y. 196; *State v. Dickson*, 78 Mo. 438. So in the proof of criminal homicide, the true cause of death must be clearly established; and the possibility of accounting for the event by self-inflicted violence, accident, or natural causes, excluded; and only when it has been irrefragably proved that no other hypothesis will explain all the conditions of the case can it be safely and justly concluded that it has been caused by intentional injury. But the cause of death may also be proved by circumstances: *Smith v. Commonwealth*, 21 Gratt. 809. At this stage of investigation, the testimony of medical and scientific persons, such as surgeons, physicians, and chemists, by whom the body or its remains have been inspected and examined, either at the time of their discovery or shortly after, becomes very important; but a consideration of such testimony would invade the extensive department of medical jurisprudence, and must be omitted.

5. *Poisoning and Infanticide*.—There are two classes of cases of criminal homicide in which the cause of death can rarely be proved by direct evidence, and in which the proof of it by circumstantial evidence is attended with peculiar difficulties. These are poisoning and infanticide. But of the various forms of criminal homicide, that of infanticide, by which is popularly understood the murder of a recently born infant for the purpose of concealing its birth, perhaps presents the greatest difficulties in the establishment of the *corpus delicti*. No universal and invariable rule can be laid down with respect to it. Each case must depend upon its own peculiar circumstances; and as in all other cases, the *corpus delicti* must be proved by the best evidence which is capable of being adduced, and such an amount and combination of relevant facts, whether direct or circumstantial, as establish the

imputed guilt, to a moral certainty, and to the exclusion of every other reasonable hypothesis: *Wills on Circumstantial Evidence*, pp. 216, 233, 266, where many illustrative cases are given. Where a person of generally good health dies suddenly, and the symptoms and appearances indicate narcotic poisoning, but are also similar to symptoms common to disease of the heart, or congestion of the brain or stomach, and the testimony and opinions of several physicians who examined the stomach and contents, without any analysis, is conflicting and leave it in doubt, with the probabilities equally balanced, whether the deceased died of poison or of disease—these facts, though accompanied by proof of a confession of the accused that he had administered narcotic poison, are not sufficient to warrant conviction: *Pitts v. State*, 43 Miss. 472.

6. *In Larceny and Robbery*, the essence of the *corpus delicti* is that the property claimed to have been stolen has been feloniously taken out of the prosecutor's possession. The loss must be distinctly proved. The *corpus delicti* must be made out in some mode, by positive or presumptive testimony, and then the presumption arising from possession will attach: *Rex v. Haines*, 6 Car. & P. 176; *Carey v. State*, 7 Humph. 499; *Tyner v. State*, 5 Id. 384; *State v. Hogard*, 12 Minn. 293. In larceny, the extrajudicial confessions of the accused, where the *corpus delicti* is not proved by evidence *aliunde*, are insufficient to warrant a conviction: *Jenkins v. State*, 41 Miss. 582; *State v. Scott*, 39 Mo. 424. So in robbery: *People v. Thrall*, 50 Cal. 415; *People v. Jones*, 31 Id. 565. There must be some evidence or corroborating circumstances tending to show that a crime has been committed aside from such confessions or statements: See case last cited. But the *corpus delicti* may be proved by circumstances: *State v. Davidson*, 30 Vt. 377. In larceny, it sometimes happens that the prosecutor is unable to swear to any loss, as where goods have been stolen from a large quantity, such as a small quantity of wine from many thousand gallons, etc. In such cases, if circumstantial evidence satisfies the jury of the guilt of the prisoner, he may be convicted though the prosecutor is unable to swear that he has lost the thing charged to have been stolen: *Regina v. Burton*, 6 Cox C. C. 293; *Regina v. Mockford*, 11 Id. 16; S. C., 17 L. T., N. S., 582; *Regina v. Burton*, 24 Eng. L. & Eq. 551; *Regina v. Hooper*, 1 F. & F. 85; and of course the circumstances in such cases may show sufficient evidence of the *corpus delicti* to go to the jury: *Regina v. Burton*, 24 Eng. L. & Eq. 551. So, a person may be convicted of larceny upon evidence connecting him with the theft, though the article stolen may not be identified, or even found: *State v. Kent*, 65 N. C. 311. It seems, too, that where the possession of stolen property has been very recent, strict proof of its identity is unnecessary. Thus, where a bale of cotton has been stolen, and traced immediately into the possession of the defendant, if the cotton found in his possession, although then in bulk, appears to have been formerly packed, and resembles that which was stolen, the evidence of identity is sufficient to be submitted to the jury: *State v. Slack*, 1 Bailey, 330.

7. *Arson*.—The *corpus delicti* in a case of arson is the burning of the house: *Sam v. State*, 33 Miss. 347; *Phillips v. State*, 29 Ga. 108. And if that fact be established by other evidence, the confessions of the accused are competent to show that the burning was felonious, and that he was the criminal agent: *Sam v. State*, 33 Miss. 347. If circumstantial evidence is introduced to connect the defendant with the criminal act, the circumstantial facts themselves must be connected with the defendant or they will be incompetent as evidence: *People v. Kennedy*, 32 N. Y. 141.

8. *In Burglary*, the *corpus delicti* consists of the breaking and entering by

some person of the dwelling-house of another with intent to commit a felony therein: *Johnson v. Commonwealth*, 29 Gratt. 811. But there can be no conviction on an indictment for burglary in a dwelling-house, unless it is proved that some one resided in the house: *Fuller v. State*, 48 Ala. 273. For a case in which the evidence was held insufficient to identify the prisoner as the person who had committed the burglary, see *Johnson v. Commonwealth*, 29 Gratt. 796.

9. *In Rape*, the *corpus delicti* consists of the fact that violence has been actually committed on the woman. The facts which go to show the commission of this offense, as distinguished from those which connect the accused with it as the perpetrator, consist of appearances on the person and clothing of the female, a description of which may be found in works on medical jurisprudence: Taylor's Med. Jur. 513; 1 Beck's Med. Jur. 188; 3 Wharton & Stillé's Med. Jur., secs. 212-232.

10. *Forgery—Embezzlement—Riot*.—In forgery, the *corpus delicti* consists of the fact that the writing produced and exhibited on the trial is a forged writing, or in other words, that it is not the writing of the party by whom it purports to have been made, or that it is not the writing of any real person at all: Burrill on Circumstantial Evidence, 726. In the former case, the forgery may be proved by the testimony of the party himself; but the rule on this point is not uniform: *Id.*, and numerous cases there cited. In the latter case, it is proved by showing that no such person exists: *Id.* There must, however, be proof *abundant* of the *corpus delicti*, although it is said that such proof need not be conclusive in such a case. Evidence of confessions alone, unsupported by corroborating facts and circumstances, is not sufficient to convict: *People v. Badgley*, 16 Wend. 53. This is also true in cases of embezzlement: *People v. Hennessey*, 15 Id. 147. In riot, it must be proved that there was an actual disturbance of the public peace: Wharton's Cr. Ev., sec. 324.

11. *Other Matters*.—It constantly happens that the fact of the *corpus delicti* cannot be proved by any evidence which does not at the same time prove or tend to prove that the accused was the perpetrator of the crime: 10 Cent. L. J. 165; but where there is any doubt of the commission of the crime alleged, it is usual and important in all criminal trials to instruct the jury in regard to any separation between the circumstances which tend to prove the *corpus delicti*, and those which go to identify the guilty party: *State v. Davidson*, 30 Vt. 385. Absolute certainty is not required to be made out by the evidence in any criminal case. Proof of guilt to a moral certainty justifies a conviction: *State v. Hogard*, 12 Minn. 293. When the special facts and circumstances of a case are brought into view, the judge should caution the jury with respect to any part of the case in which they are liable to be misled, whether it be the *corpus delicti*, the identity, or any other part of the case; and they should convict when, and only when, taking all into consideration, they affirmatively believe from the evidence, beyond a reasonable doubt, that the defendant is guilty as charged: *Commonwealth v. Webster*, 52 Am. Dec. 711, and note 737; 1 Bish. Cr. Pr., sec. 1069.

CAPE FEAR ETC. NAVIGATION COMPANY v. WILCOX.

[7 JONES'S LAW, 481.]

ONE WHO PREVENTS PERFORMANCE OF CONDITION, or makes it impossible by his own act, shall not take advantage of the non-performance.

STATUTE OF LIMITATIONS BEGINS TO RUN WHEN.—Where an incorporation is empowered by statute to collect assessments by sale of stock, and then by suit for the balance due, the statute of limitations does not begin to run till the stock is sold and the balance ascertained; and suit for such balance may be brought any time within three years from the sale.

ASSUMPSIT to recover a balance due on a subscription, as follows: "We, the subscribers, promise to pay the amount annexed to our names, provided that the suits now pending in Moore court of equity are decided in our favor, and that it is understood that we pay no installment or money for the opening of the river until these suits are decided in our favor. February 28, 1849. George Wilcox. \$750." Defendant compromised the suits referred to, but did not pay his subscription. His stock was sold under the statute of incorporation and the proceeds applied upon the subscription, and this suit was brought for the balance. When the suit was brought, more than three years had passed since the date of the subscription, but less than three years had passed since the sale. Defendant set up as a defense non-performance of condition and statute of limitations. Verdict for the plaintiff, and defendant appealed.

Haughton, for the plaintiff.

Phillips, for the defendant.

By Court, PEARSON, C. J. One who prevents the performance of a condition, or makes it impossible by his own act, shall not take advantage of the non-performance. Lord Coke illustrates the rule by this case: "If A be bound to B that J. S. shall marry Jane G. upon such a day, and before the day B marry with Jane, he shall not take advantage of the bond, for that he, himself, is the mean that the condition could not be performed, and this is regularly true in all cases:" Co. Lit. 20 b.

In our case, the defendant, by compromising the suits, and acquiring the right of Williams, by means of his release, made the condition impossible, and according to the rule, cannot take advantage of its non-performance in order to defeat his subscription.

This action is not barred by the statute of limitations, for a

sale of the stock was made within less than three years after the assessment, and this action, for the balance after deducting the proceeds of the sale, was commenced within less than three years after the sale, at which time the balance due was ascertained, and the cause of action for the balance accrued.

Admit that the remedy given by the statute is cumulative, and that the plaintiff might have brought an action of *assumpsit*, at common law, for the amount assessed, and that the common-law action was barred by the statute of limitations when the writ in this case issued, the remedy given by the statute embraces, not simply a sale of the stock, but also an action for the balance, and as the election to pursue the statute remedy was made within three years after the assessment, no question can be made as to its not being in time; and being commenced in time by a sale, the other branch of the remedy, to wit, an action for the balance, was not barred until three years after the sale, because that right of action did not accrue until the sale. There is no error.

Judgment affirmed.

LIMITATIONS OF ACTIONS ON SUBSCRIPTIONS: See *Pittsburgh etc. R. R. Co. v. Byers*, 72 Am. Dec. 770, and cases cited in note to same 773; *Robinson v. Pittsburgh etc. R. R. Co.*, Id. 792, and note 795. Conditional subscriptions to stock are valid: *New Albany etc. R. R. Co. v. McCormick*, 71 Id. 337.

ROBERTS v. MCNEELY.

[7 JONES'S LAW, 506.]

INTEREST ON CONTRACT, made in one county, and to be performed in another, will be computed according to the law of the latter.

NOTE GIVEN FOR MERCHANDISE IS NOT USURIOUS, where it is made in one state and payable in another, if the rate of interest does not exceed the lawful rate of the latter state.

DEBT. Action on promissory note. The parties resided in North Carolina. The note was made in North Carolina, given in payment for merchandise, and was made payable in New York where the rate of interest was seven per cent. Defense was the plea of usury. Judgment for the plaintiff, and defendant appealed.

Blackmer and Clement, for the plaintiff.

Boydén, for the defendants.

By Court, PEARSON, C. J. It seems to be settled that where a contract is made in one country, and is to be performed in another, the rate of interest will be according to the law of the latter. This conclusion is put upon the ground that the parties had in view the law of the country where the money was to be paid, and intended to be governed by that law, and not by that of the *loci contractus*: *Davis v. Coleman*, 7 Ired. L. 424; *Arrington v. Gee*, 5 Id. 590; where the subject is fully discussed, and the authorities cited.

So, by the terms of the note sued on, the plaintiff was entitled to seven per cent interest (the rate in the state of New York), and if it had been given for money loaned, or for a debt previously contracted in this state, there would have been ground to support the allegation of usury. But the note was given as the price of merchandise, and the inference is, that the place of payment, and consequently, the rate of interest, was taken into consideration by the parties, and affected the price which was to be given for the goods—the plaintiff selling at a lower sum, because of the benefit they were to derive from having the price paid in New York, so as to give them the control of northern funds and save exchange.

The transaction, being a sale of goods, and not a loan of money, puts the idea of usury out of the question, in the absence of proof that it was intended as a cloak to cover what was in fact a loan of money, or an arrangement to get “forbearance” on a pre-existing debt: *Beete v. Bidgood*, 7 Barn. & Cress. 453, S. C., 14 Eng. Com. L. 453, fully supports this conclusion. That was a contract by parties in England (where the interest was five per cent), for the sale of a plantation in the colony of Demarara, where the interest was six per cent, and in fixing the price, which was to be on a long credit, six per cent was calculated and included in the note given for the price which was payable at Liverpool, England. Lord Tenterden, C. J., delivering the opinion of the court, says: “The case which is now presented to the consideration of the court arises out of a contract for the sale of an estate, and not for the loan of money. The agreement was founded partly upon what was considered the present price of the estate, and partly upon what was considered its price if paid at a future day. . . . It appears to me that this was, in substance, a contract for the sale of the estate at the price of twenty thousand pounds, to be paid by installments. In that, there is no illegality.”

In our case, the contract was for the sale of goods, and not

for the loan of money. The agreement was founded partly upon what was considered the value, if paid for in Salisbury, and partly upon what was considered the value if paid for in New York, and of course in northern funds. So there was no illegality in it.

There is no error.

Judgment affirmed.

INTEREST ON CONTRACT IS GOVERNED BY LAW OF PLACE WHERE IT IS TO BE PERFORMED: See extended note to *Selleck v. French*, 6 Am. Dec. 192; *Fanning v. Consequa*, 8 Id. 442; *Cooper v. Sandford*, 26 Id. 239. These cases, however, and *Wyse v. Dandridge*, 72 Id. 149, give some qualifications of the rule. In *Holley v. Holley*, 12 Id. 342, it is held that the rate of interest is governed by the *lex loci contractus*, but in connection with this, see note to case first cited. On the same subject, see *Kanaga v. Taylor*, 70 Id. 62.

NOTE DRAWS INTEREST ACCORDING TO LAWS OF STATE IN WHICH IT IS PAYABLE: *Lapice v. Smith*, 33 Am. Dec. 555; *Peck v. Mayo*, 39 Id. 205; *Odell v. Gray*, 55 Id. 147; *Emanuel v. White*, 69 Id. 385; *Emerson v. Patridge*, 62 Id. 617. But in *McAllister v. Smith*, 65 Id. 651, it is held that the laws of state where bill of exchange is made will, if parties are silent, fix rate of interest which it is to draw.

JONES v. WITHERSPOON.

[7 JONES'S LAW, 555.]

OWNER OF DOMESTIC ANIMALS IS NOT LIABLE FOR DAMAGES caused by their trespassing upon an unfenced cultivated field.

COMMON-LAW RULE REQUIRING DOMESTIC ANIMALS TO BE INCLOSED is not in force in North Carolina.

THE facts are sufficiently stated in the opinion.

Gaither and Folk, for the plaintiff.

Lenoir, for the defendant.

By Court, MANLY, J. The case made by the transcript from the superior court of Caldwell is, whether a planter, who has not a fence as required by law, about his cultivated field, nor any navigable or deep water to serve instead thereof, can recover for a trespass of the defendant's domestic animals on a field thus unprotected. We answer with the court below, that he cannot.

To maintain a liability of the kind, it would be necessary to hold that the proprietors of such animals are bound to keep them under restraint and prevent them from going and pasturing on the uninclosed grounds of a neighbor. For, we take it,

the rights and liabilities of the parties would be the same in a case where there is no fence or barrier, and one in which the barrier is declared by law to be insufficient.

At the term of this court, which has just closed its session at the city of Raleigh, we held, incidentally, in the case of *Laws v. North Carolina R. R. Co.*, 7 Jones L. 468, that a proprietor of cattle is not obliged to keep them from the uninclosed lands of a neighbor. The going at large of all kinds of domestic animals upon uninclosed lands about them seems to be a matter commonly tolerated by the laws and usages of the country. The law makes it penal to kill animals trespassing upon a cultivated field that is not lawfully inclosed, and also indictable to kill them in the range in certain localities; from which, it would appear that they are not without the pale of the law's protection when in these conditions. And although they may be trespassers, having no right of pasture outside of the owner's lands, and therefore may be driven and kept off, if possible, yet, to effect these objects, it is not lawful to kill, maim, or abuse. In short, the law recognizes, in a variety of ways, the going at large of domestic animals as a common privilege, and it would seem to follow, as a necessary consequence, that the owner is not liable, in trespass, for breaking the close when the former's cattle wander in search of food upon the latter's uninclosed grounds.

Thus the keeping under inclosure domestic animals, which is regarded as the rule of the common law of England, if it were ever recognized in our waste and thinly populated country, has been long since abrogated by various legislative acts, and by constant usage to the contrary.

The stream between the parties to this suit, by the statement of the case, appears to be insufficient as a substitute for a fence, and we have already said it is the same whether there be no fence or an insufficient one.

We are of opinion, therefore, in the case before us, neither proprietor would be liable to the other for damage done by animals of the one, wandering across the common boundary upon the lands of the other.

Judgment affirmed.

COMMON-LAW RULE, REQUIRING OWNER OF DOMESTIC ANIMALS TO KEEP THEM AT HOME, does not prevail in Ohio or Mississippi: See *Vicksburg etc. R. R. Co. v. Patton*, 66 Am. Dec. 552, and cases cited in note thereto 574. So in South Carolina, animals are to be fenced out, and not in: *Murray v. South Carolina R. R. Co.*, 70 Id. 219, and note 222. But this rule has not

been changed in New Hampshire: *Lawrence v. Combs*, 72 Id. 332. For common-law rule, see case last cited, and notes thereto 335; *Myers v. Dodd*, 68 Id. 624, and note 626.

THAT OWNER OF DOMESTIC ANIMALS IS NOT RESPONSIBLE FOR THEIR TRESPASSES in roaming over adjacent uninclosed fields, see *Murray v. South Carolina R. R. Co.*, 70 Am. Dec. 219, and note 222. *Contra*: See *Myers v. Dodd*, 68 Id. 624, and note 626; *Lawrence v. Combs*, 72 Id. 332, and note 335. As to liability for trespasses committed by domestic animals and those wild by nature, see distinction shown in the fully annotated case of *Decker v. Gammon*, 69 Id. 99, 103.

THE PRINCIPAL CASE WAS CITED in *Burgoyne v. Whitfield*, 81 N. C. 264, to the second point in the *syllabus*, *supra*. Stock in North Carolina may lawfully be allowed to range at large without the right of any one to recover for their trespasses, or do otherwise than drive them off their premises without hurt, unless he have a fence as required by law: *Id.* In *Burton v. Patterson*, 87 Id. 344, it was cited to the first point in the *syllabus*, *supra*; and also to the point that the rights and liabilities of the parties would be the same in a case where there is no fence or barrier, and one in which the barrier is declared by law to be insufficient.

ROBINSON v. CLARK.

[7 JONES'S LAW, 592.]

MINISTERIAL OFFICERS, SUCH AS SHERIFF OR CONSTABLE, CANNOT BUY AT HIS OWN EXECUTION SALE, either directly or indirectly, either by himself or an agent, for himself or another. The fact that the sale is conducted by another officer, in concert and joint interest with the officer buying, does not alter the case. The sale passes no property.

TROVER for the conversion of a wagon. Battle, a constable, and Tate, a deputy sheriff, had several executions against the plaintiff, and levied on the wagon in question on the same day, and agreed to sell it on the same day for their joint benefit. Plaintiff was absent on the day of sale. Several persons were present, but the officers agreed that Tate should cry the sale, and Battle bid off the property for the plaintiff, the defendant in the executions. That is, Battle was to bid off the property, and hold it till the plaintiff returned, when he was to have the liberty of redeeming it by paying the amount bid with interest. According to this understanding, the wagon was sold and bought by Battle, who afterwards transferred his bid to defendant, who agreed to take the property on the terms and subject to the trust attaching to it in the hands of Battle. Plaintiff, on his return, tendered to defendant the sum paid by him for the wagon, with interest, and demanded the wagon, but defendant refused to surrender, and this action was brought.

The jury were instructed by the court below that an officer could not buy at his own sale; that this sale was a nullity, and that plaintiff could recover the wagon.

J. W. Woodfin, for the plaintiff.

Merriman and Henry, for the defendant.

By Court, MANLY, J. It seems to us, the view which his honor took of this case, in the superior court, is correct. It is a well-settled principle that an officer (sheriff or constable) cannot buy at his own sale, either directly or indirectly, either by himself or an agent, for himself or another: *McLeod v. McCall*, 3 Jones L. 87.

By a reference to the facts of the case, as reported, it is manifest that the sale of officer Tate was made by him in behalf, not only of himself, under the executions which he had levied, but also, in behalf of the other officer, Battle, who had also levied simultaneously with Tate, and who was present at the sale; and it is in like manner manifest that Battle bought, not upon his own motion alone, or for himself, but on account of a mutual understanding between the two that he was to buy and hold the legal title to the property in trust for the defendant in the execution. It is a sale, then, in substance, by two officers, and a purchase by one, which is, of course, a purchase by the latter at his own sale. This is in contravention of the well-established principle, as stated above.

The mischief that is intended to be remedied by the disability of an officer to buy at his sale, would pertain with increased powers of harm to a case of combination between two officers, like the one before us. The purpose of the officers in question seems to have been fair and benevolent, but such combinations might be converted into schemes of fraud, as this has been, in fact, by the defendant, who is the assignee of the officer. We think, therefore, that concert of action on the part of the officers, so far from taking it out of the rule, makes it more clearly and strongly liable to its operation. The case of *Pitt v. Petway*, 12 Ired. L. 69, to which our attention has been called, establishes no principle in conflict with the rule as here held; for supposing trustees and ministerial officers of the court to stand upon the same footing, and suppose the plaintiff was willing to regard the sale as good *sub. modo*, to the extent and for the purpose held in that case, yet, when the plaintiff found the defendant no longer acknowledged

the trust, the plaintiff was at liberty, also, to repudiate it and regard the sale as a nullity.

Judgment affirmed.

PURCHASE BY SHERIFF, OR DEPUTY, AT HIS OWN SALE, EJECTOR CASE: See *Levett v. Pils*, 66 Am. Dec. 243, and collected cases in note thereto 250.

CARSON v. RAY.

[7 JONES'S LAW, 603.]

PREMISES WILL PASS BY DEED, WHERE THEY ARE DESCRIBED AS "my house and lot in the town of Jefferson, in Ashe county, North Carolina," if the grantor has a house and lot, and only one, in that town. The description is sufficient because there is no patent ambiguity in it.

CONSTRUCTION OF DEED IS FOR COURT.

EJECTMENT. The lessor of the plaintiff claimed title under a judgment and execution against Long, and a sheriff's sale and deed, all of which, with the defendant's possession, were admitted. Defendant claimed title to the same premises under a deed from Long, given for a valuable consideration, and dated prior to the execution. The deed described the premises as, "my house and lot in the town of Jefferson, in Ashe county, North Carolina;" and when executed, Long had a fee-simple right to the property, and there was no evidence that he owned any other house and lot in the town of Jefferson. It was contended that defendant's deed was void for uncertainty in the description of the premises. This was the only point debated. Plaintiff was nonsuited.

Boyden, for the plaintiff.

Crumpler, for the defendant.

By Court, BATTLE, J. We agree with his honor, who tried the cause, that the description of the house and lot contained in the deed under which the defendant claimed was sufficiently certain to identify and convey the property. The terms, "my house and lot in the town of Jefferson," if contained in a will, would undoubtedly be sufficient to pass the testator's house and lot, in the absence of any proof to show that he had more than one. Thus it was held in a strongly analogous case, that a bequest of "my twenty-five shares of bank stock," when the testator had just that number of shares, was a specific legacy; while a designation of them as simply "twenty-five

shares of stock," without the prefix of the word "my," was a general legacy: *Kinsey v. Rhem*, 2 Ired. L. 192. If, then, such a description would be sufficiently certain in a will, we cannot perceive any reason why it should not be so in a deed, as in both instruments the only requisite as to the certainty of the thing described is that there shall be no patent ambiguity in the description by which it is designated.

A house and lot, or one house and lot, in a particular town would not do, because too indefinite on the face of the instrument itself: See *Plummer v. Owens*, Busb. Eq. 254; *Murdock v. Anderson*, 4 Jones Eq. 77. But "my house and lot," imports a particular house and lot, rendered certain by the description that it is one which belongs to me, and upon the face of the instrument, is quite as definite as if it had been described as the house and lot in which I now live, which is undoubtedly good. Where the deed or will does not itself show that the grantor or devisor had more than one house and lot, it will not be presumed that he had more than one, so that there is no patent ambiguity, and if it be shown that he has more than one, it must be by extrinsic proof, and the case will then be one of a latent ambiguity, which may be explained by similar proof.

It is true that in the case of the latter kind of ambiguity, the extrinsic proof may turn out to be insufficient to remove the uncertainty thus raised, and the grant or devise may fail on that account, but that is very different from the case of a patent ambiguity, which is always a question for the court, and in which the court must see that the subject-matter of the grant or devise is so uncertain that there is nothing described to which any proof can apply. The case of *Edmundson v. Hooks*, 11 Ired. L. 373, to which we have been referred by the plaintiff's counsel, furnishes an apt illustration. In that case, it appeared that the sheriff held several executions against John Hooks and others; one against John Hooks alone, and one against John Hooks and one Woodard. The sheriff's deed recited all these executions, a levy upon "the defendant's lots at Nahanta depot," a sale; and thereupon conveyed "the lots levied on" to the lessor of the plaintiff. The court very properly held it to be a case of patent ambiguity, and that the description of the lots intended to be conveyed was too uncertain to be good. "Were the lots those of John Hooks alone, or one of the other defendants in the execution? Or were they the joint property of all?" There was undoubtedly an uncer-

tainty as to whose property the lots were, which was apparent upon the face of the deed itself, and of course the court was obliged to say that the description was void for the uncertainty. Had John Hooks been the only defendant in the execution, then the description of "the defendant's lots at Nahanta" would have pointed to something definite, to wit, John Hooks's lots at that place, and the decision would have been different.

The judgment is affirmed.

DESCRIPTION IN DEED SUFFICIENT TO PASS TITLE: See *Alexander v. Miller's Ex'rs*, 70 Am. Dec. 314, and collected cases in note thereto 318.

CONSTRUCTION OF DEED IS FOR COURT: See numerous cases cited to this point in the extended note to *Fagin v. Connely*, 69 Am. Dec. 454, treating of construction of writing, when a question for the court, and when for the jury.

CITATIONS OF PRINCIPAL CASE.—All "my" land on both sides of Haw river is as definite as "my" house and lot in the town of Jefferson; or "the land on which I live;" or the land of which A died seized and possessed, and which no doubt is good: *Henley v. Wilson*, 81 N. C. 409. In *Farmer v. Batts*, 83 Id. 388, 389, numerous instances of sufficient and insufficient descriptions of land in deeds are given, and among them is cited the principal case to the first point in the *syllabus*, *supra*.

MENDENHALL v. PARISH.

[8 JONES'S LAW, 105.]

ACKNOWLEDGMENT IN DEED, BY BARGAINOR, of the reception of the consideration-money, is a bar to an action at law for the purchase-money.

THE opinion contains the facts.

Morehead and McLean, for the plaintiffs.

Fowle and Gorrell, for the defendant.

By Court, MANLY, J. This is an action of *assumpsit*, in which the plaintiff alleges a liability of the defendant upon an undertaking, that he would, in consideration of a deed for a certain patent right, to be used in the state of Arkansas, pay therefor six hundred dollars, at three months' credit, and make a good note for it. The declaration is in two counts: 1. For not making the note; 2. For not paying the money.

The case turns upon the effect of a release, pleaded as a bar to the recovery, and which is found in the deed, for the right to use the patent above referred to, and dated the twelfth of

October, 1857. We concur with his honor that the release in the deed is a bar at law to the plaintiff's recovery on either count. In either aspect, it is an action for the consideration expressed in the deed. The consideration is there declared to be paid, and the plaintiffs, who are the grantors in the deed, are estopped to deny it in this action.

This question was brought directly into judgment in the case of *Brocket v. Foscue*, 1 Hawks, 64; and it was there held that when a deed contains an acknowledgment, by the bargainor, of the reception of the consideration-money, with an exoneration therefrom, it amounts to a bar to the action for the purchase-money, and that parol evidence shall not be received to contradict the averment of payment in such case.

The same principles are decided in the case of *Lowe v. Weatherley*, 4 Dev. & B. 212; and are again recognized in the cases of *Crawley v. Timberlake*, 1 Ired. Eq. 346, S. C., 2 Id. 460, where equity takes jurisdiction and relieves from the legal effect of such release upon a case, made, of ignorance and misapprehension.

Our attention has been called to the case of *Robbins v. Love*, 3 Hawks, 82; and *Lane v. Wingate*, 3 Ired. L. 326. There is no conflict, as we think, between these cases and the cases of *Brocket v. Foscue*, *supra*, and *Lowe v. Weatherley*, *supra*.

The first, *Robbins v. Love*, *supra*, was an action of *assumpsit*, for a balance of one thousand dollars due for merchandise sold. The defendant was permitted to introduce a deed for a house and lot, in which the consideration was stated to be one thousand dollars in hand paid, and to prove by the subscribing witness that it was paid by an agreement to consider the debt for the goods extinguished. This was held, not to be a contradiction of the deed, but proof of a distinct fact only, as to how the money came which the defendant acknowledges the reception of, in his deed to the plaintiff. Thus, without contradicting his deed, the defendant was enabled to show distinct facts which amounted to an accord and satisfaction, and which furnished, of course, a complete answer to the plaintiff's action of *assumpsit*.

The other case, *Lane v. Wingate*, 3 Ired. L. 326, was an action of *assumpsit* also, upon a parol obligation, not under seal, with condition for the support of an aged woman slave. No consideration was stated in the writing, and the plaintiff resorted to evidence *dehors* the instrument, and showed, upon a sale of negroes by plaintiff to defendant, he wished to purchase,

besides those the plaintiff was willing to sell, a boy by the name of Daniel. Plaintiff's objection to the sale of Daniel was, that he wanted him to wait on the old woman referred to in the condition of the obligation. And thereupon, the defendant agreed, if the plaintiff would sell him Daniel, he would maintain the woman for life, and accordingly entered into the obligation on which the action was brought. Defendant, in answer to the action, introduced the deed of sale for Daniel and other slaves, in which plaintiff acknowledges that he had received a sum in full for the said negroes, and contended that plaintiff was estopped by the said deed from recovering under the said agreement. But the court held otherwise, upon the ground that the agreement was a distinct obligation, growing out of the sale of Daniel, and that it was not any part of the money-consideration, the reception of which was acknowledged in the deed, and there was, therefore, no estoppel.

Both these cases were put upon peculiar grounds, and were not supposed by the learned judges who then presided in the court to impugn at all the doctrine of estoppel by deed, and cannot, therefore, be rightfully invoked for that purpose.

In the case now before us, the action is for the recovery of the consideration mentioned in the deed—the purchase-money of the patent. For we do not perceive that it varies the matter or object of the action whether the recovery be had upon the count for six hundred dollars, the price of the patent, which was to be paid after three months' time, or for the six hundred dollars as damages for not giving a good note in the mean time for the price aforesaid. It is equally an action for the recovery of the consideration-money of the deed, and this the party plaintiff has acknowledged by his deed to be paid. He is concluded by his acknowledgment under seal.

Judgment affirmed.

ESTOPPEL BY RECEIPTS IN DEEDS: See *Osborne v. Endicott*, 65 Am. Dec. 498, and note 500.

RECEIPT IN DEED ACKNOWLEDGING PAYMENT of consideration-money, effect of: See *Wood v. Chapin*, 67 Am. Dec. 62; *Lloyd v. Lynch*, 70 Id. 137, and citations in notes to these cases.

STATE v. HARRIS.

[8 JONES'S LAW, 123.]

WHERE ONE ALLEGED TO BE DEAF AND DUMB FROM HIS BIRTH IS ARRAIGNED FOR MURDER, it should be left to a jury to determine whether he is of unsound mind, incapable of understanding the charge against him, and the nature and purpose of the trial, and his rights therein. If the jury find these issues in his favor, he should not be placed upon his trial.

MURDER. Defendant was indicted and arraigned, when it was suggested that he was a mute, having been deaf and dumb from birth. The counsel for the state admitted this, and moved the court that a plea of "not guilty" be entered, and that the trial proceed. It was then objected by defendant's counsel that the prisoner was insane, and unable to plead to the indictment; whereupon the court denied the motion of the state's counsel, and ordered a jury to inquire: 1. Whether the accused was able to plead to the indictment; 2. Whether the prisoner was sane or insane. The court instructed the jury, against the objections of counsel for the state, that if they believed from the evidence that the defendant was of unsound mind, incapable of understanding the charge against him, and could not be made to understand the purpose and nature of the trial and his rights thereat, they should find the above issues in his favor; which they did. Whereupon the court refused to put the accused upon his trial, and from this order an appeal is taken.

W. A. Jenkins, attorney-general, and Graham, for the state.

Miller and Reade, for the defendant.

By Court, **BATTLE, J.** The proceedings in this case are a novelty in the administration of criminal justice in this state, and but for the light which is thrown upon them by some recent decisions in that country from which our common law is derived, we might find a difficulty in dealing with them.

In *Rex v. Dyson*, which is reported in Russ. & Ry. 523, and also in a note to *Rex v. Pritchard*, 7 Car. & P. 303, S. C., 32 Eng. Com. L. 518, the prisoner was indicted for the murder of her bastard child, by cutting off its head. She stood mute; and a jury was impaneled to try whether she did so by malice or by the visitation of God; and evidence having been given of her always having been deaf and dumb, the jury found that she stood mute by the visitation of God.

The learned judge then examined a witness on oath, who swore that he was acquainted with her, and that she could be made to understand some things by signs, and could give her answers in the same way. The witness was then sworn as follows: "You swear that you will well and truly interpret and make known to the prisoner at the bar, by such signs, ways, and methods as shall be best known to you, the indictment wherewith she stands charged; and also, all such matters and things as the court shall require to be made known to her; and also, well and truly to interpret to the court the plea of the said prisoner to the indictment, and all answers of the said prisoner to the said matters and things so required to be made known to her, according to the best of your skill and understanding. So help you God."

The witness then explained to her, by signs, what she was charged with, and she made signs which obviously imported a denial, and which he explained to be so. This being done, the judge directed a plea of "not guilty" to be recorded. The witness was then called upon to explain to her that she was to be tried by a jury, and that she might object to such as she pleased; but he and another witness stated that it was impossible to make her understand a matter of that nature, though upon common subjects, of daily occurrence, which she had been in the habit of seeing, she was sufficiently intelligent. One of the witnesses had instructed her in the dumb alphabet, but she was not so far advanced as to put words together, and the witness swore that though she was then incapable of understanding the nature of the proceedings against her, and making her defense, yet he had no doubt that with time and pains she might be taught to do so, by the means used for the instruction of the deaf and dumb.

The judge (Mr. Justice J. Parke) then directed the jury to be impaneled and sworn to try whether she was sane or not; whereupon, the same witnesses were sworn and examined, and proved her incapacity, at that time, to understand the mode of her trial, or to conduct her defense.

The judge, in charging the jury so impaneled, referred to Lord Hale, who, in his *Pleas of the Crown*, vol. 1, p. 34, says: "If a man, in his sound memory, commits a capital offense, and before his arraignment, he becomes absolutely mad, he ought not, by law, to be arraigned during such his frenzy, but be remitted to prison until that incapacity be removed. The reason is, because he cannot, advisedly, plead to the indict-

ment. And if such person, after his plea and before his trial, become of non-sane memory, he shall not be tried; or if, after his trial, he become of non-sane memory, he shall not receive judgment; or if, after judgment, he become of non-sane memory, his execution shall be spared; for were he of sound memory, he might allege, somewhat, in stay of judgment or execution. But because there may be great fraud in this matter, yet, if the crime be notorious, as treason or murder, the judge, before such respite of trial or judgment, may do well to impanel a jury to inquire, *ex officio*, touching such insanity, and whether it be real or counterfeit." The judge then told the jury that if they were satisfied that the prisoner had not then, from the defect of her faculties, intelligence enough to understand the nature of the proceedings against her, they ought to find her "not sane," which they accordingly did. His lordship thereupon ordered her to be kept in strict custody, under the 39 & 40 Geo. III, c. 94, sec. 2, till his majesty's pleasure should be known.

A similar cause occurred afterwards before Baron Alderson (see *Rex v. Pritchard*, 7 Car. & P. 303; S. C., 32 Eng. Com. L. 517), when he referred to *Rex v. Dyson*, Russ. & Ry. 523, and said the course which Mr. Justice Parke had pursued had been approved of by several of the judges, and that he should follow it. He accordingly had a jury impaneled, and told them that there were three points to be inquired into: "1. Whether the prisoner is mute of malice or not; 2. Whether he can plead to the indictment or not; 3. Whether he is of sufficient intellect to comprehend the course of the proceedings on the trial, so as to make a proper defense; to know that he may challenge any one of you to whom he may object, and to comprehend the details of the evidence, which, in a case of this nature, must constitute a minute investigation. Upon this issue, therefore, if you think there is no certain mode of communicating the details of the trial to the prisoner so that he can clearly understand them, and be able, properly, to make his defense to the charge, you ought to find that he is not of sane mind. It is not enough that he may have a general capacity of communicating on ordinary matters." The jury returned a verdict that the prisoner was not capable of taking his trial.

We have stated these cases with more than usual particularity, because they set forth clearly the true grounds upon which a deaf and dumb prisoner, whose faculties have not been im-

proved by the arts of education, and who, in consequence thereof, cannot be made to understand the nature and incidents of a trial, ought not to be compelled to go through what must be to him the senseless forms of such a trial. Whether arising from physical defect or mental disorder, he must, under such circumstances, be deemed "not sane;" and of course, according to the great authority of Lord Hale, he ought not to be tried. The allowance to prisoners in this state the full benefit of counsel in everything connected with their trial has not been deemed sufficient to change the law as to one mentally insane, and we think it cannot have that effect in a case, like the present, of a defect of the physical faculties. The proceedings in the present case, including the instructions given to the jury by the presiding judge, are substantially the same as those in the English cases to which we have referred, and we now declare our approbation of them.

It will be borne in mind, however, that when a jury is impaneled in this state, in the case of a deaf and dumb prisoner, there is no need of an issue to inquire whether he stands mute of malice, because, even if he could speak, and yet stood mute designedly, the court must order the plea of "not guilty" to be entered for him, as required by the revised code, chapter 35, section 29.

It must be certified to the court below that there is no error in the record.

Judgment affirmed.

INSANITY AS DEFENSE TO CRIME: *Freeman v. People*, 47 Am. Dec. 216, and note 237; see also 2 Bish. Crim. Pr., sec. 666; and Lawson's *Insanity as a Defense to Crime*, 918, sec. 102, both citing the principal case.

LITTLE v. HOBBS.

[8 JONES'S LAW, 179.]

THOUGH COVENANT BE WITH TWO OR MORE JOINTLY, it shall be taken to be several, and each of the covenantees may bring an action for the breach, and for his particular damage, if the interest and cause of action of each is several. The insertion or omission of words of severance makes no difference as to the covenantees, the action in all cases following the interest, without regard to the words of the covenant.

COVENANT. The opinion states the facts.

Boyd, for the plaintiff.

Thompson, for the defendant.

By Court, MANLY, J. Several objections were made to plaintiff's recovery in this case, all of which have been abandoned in this court, except the second, in order; viz., that there were two covenantees in that part of the instrument, the breach of which is assigned as the ground of this action, and that these should have joined. We do not think this objection can be sustained.

The parties to this covenant, other than Hugh and Patsey Little, bind themselves, each separately, to the two latter in the sum of five thousand dollars, to allow the said Hugh and Patsey a full share of their father's estate. The interest of the covenantees in this stipulation is manifestly several. Damages for its violation result to each, irrespective of the other, and consequently, each may maintain an action, according to the distinction taken in the case of *Eccleston v. Clipsham*, 1 Saund. 153. In a note to that case, it is stated that though a covenant be with two or more jointly, yet if the interest and cause of action of the covenantees be several, the covenant shall be taken to be several, and each of the covenantees may bring an action for his particular damage, notwithstanding the words of the covenant are joint; and for this there are cited a number of authorities.

The law now seems to be settled that the insertion or omission of words of severance, such as "with them and each of them," can make no difference as to the covenantees, but that the action will, in all cases, follow the interest, without regard to the words of the covenant.

The paragraph cited on the argument, from 1 Chitty's Pleading, 12, is based upon a case, *Petrie v. Bury*, reported in 3 Barn. & Cress. 353; S. C., 10 Eng. Com. L. 165; and the language of the author is to be interpreted with reference to the principles decided in that case. It was a covenant with three persons, that if covenantor's wife survived him that his heirs, executors, and administrators should pay to them an annuity for her. Here, a joint action was held necessary, for the reasons, as stated by the judges who delivered the opinions, that it was a trust, and the covenantees trustees, who were not to have any part of the money to their own use, but jointly receive the same as a security for the execution of the trust, like a trust conferred, in a similar way, upon executors.

This case recognizes the distinction taken by Williams in his notes to Saunders, referred to above; viz., that the rights of covenantees as to actions upon the covenants will depend upon the nature of their interests, whether joint or several.

Judgment affirmed.

COVENANT BY SEVERAL WITH ONE, when regarded as several: *Hasbines v. Lombard*, 33 Am. Dec. 645. Covenant to several should be molded according to the interest of the parties, and each shall recover for a breach so far as his own interests extend: *Laky v. Holland*, 50 Id. 705.

FOARD v. ATLANTIC AND NORTH CAROLINA R. R. Co.

[8 JONES'S LAW, 286.]

RAILROAD COMPANY IS NOT LIABLE AS COMMON CARRIER, but as mere bailee for hire, where the agent of the company is guilty of negligence in failing to deliver a piece of machinery consigned to him for shipment with other pieces of machinery.

MEASURE OF DAMAGES AGAINST RAILROAD COMPANY for the negligence of its agent in failing to deliver a piece of machinery consigned to him with other pieces of machinery, for shipment, and by which the whole is kept idle, is compensation for the capital invested—that is, legal interest; also for any workmen thus necessarily unemployed, expenses incurred in sending for the missing machinery, and any other damages which are the direct and necessary result of such negligence.

CASE. The opinion contains the facts.

Jones and Love, for the plaintiff.

Boydén, for the defendant.

By Court, BATTLE, J. Upon the trial, it seems to have been conceded that the defendants were not liable as common carriers for their neglect to send on, in proper time, the pipe in question. It was decided in the case of *Boner v. Merchants' Steamboat Company*, 1 Jones L. 211, that a company whose ordinary business was to transport goods by water for freight was not bound, as to the time of delivery, as common carriers, but as mere bailees for hire; and we think the same rule must be applied to a company which carries goods for freight on a railroad. The rule of negligence, in such cases, makes the bailee bound for ordinary care, and of course makes him responsible for ordinary neglect. Applying this rule as a test to the facts of this case, we differ from his honor in the court below as to the result. It is our decided opinion that the agent of the company was guilty of at least ordinary if not

gross neglect, in forwarding the pipe to the defendant. It was, under instructions from the agent, put on a dray, together with another single pipe, and a bundle of three pipes to be carried to the company's depot. When it arrived there, it was, or ought to have been, put with the other articles with which it had come, as shown by the bill of lading. If it had been so placed, the agent who had been furnished with the bill of lading would not have left it behind when he sent on the other articles. A man of ordinary prudence, in the management of his own affairs, would not have permitted, while he had the bill of lading in his own hands, one pipe to be separated from the others, and would not, therefore, have neglected to send them on as he had received them, all together. Besides, when he learned that one of the articles had not been forwarded, he would have applied to the ship's agent to assist him in finding it out, as soon as he ascertained that there was some difficulty in identifying it. Mr. Fisher, the plaintiff's agent, had no other means of ascertaining which it was than any other person, but Mr. Taylor, the ship's agent, had; and he testified that if he had been applied to he could easily have pointed it out, so that the greater part of the delay might have been avoided.

As a verdict was taken for the plaintiff, subject to the opinion of the court, as to the legal liability of the defendant, we might, upon reversing his honor's opinion as to that question, direct a judgment to be entered upon the verdict for the plaintiff, but for the objection of the defendant to his honor's ruling upon the question of damages. Upon that question, we also differ from his honor. When he made the decision, we presume that the case of *Boyle v. Reeder*, 1 Ired. L. 607, was not called to his attention. That was a case where the plaintiff declared for the breach of a covenant, in which the defendant had bound himself to furnish machinery for a steam saw-mill by a stipulated time. He claimed, as damages, the estimated value of the profits, which he alleged that he might have made if the covenant had been complied with. The court said, through Ruffin, C. J., who delivered their opinion, that "very certainly damages are not to be measured by any such vague and indeterminate notion of anticipated and fancied profits of a business or adventure which, like this, depends so much on skill, experience, good management, and good luck for success. That would make the defendant an insurer against losses from any cause, in a business of hazard, and even

against the plaintiff's want of management. The gains of the business the plaintiff might have done, or probably would have done, cannot be correctly estimated; and therefore, evidence offered with a view of estimating them as the standard of damages was properly excluded as being irrelevant and tending to mislead the jury." The proper measure of damages, the court said, was to give the plaintiff "a fair rent for the time, or compensation for the capital invested and lying idle." This rule, we think, will apply to the present case; and being one which we find to have been adopted by this court, after full consideration, we feel no inclination to disturb it. In our opinion, then, the plaintiff will be entitled to recover from the defendant, on another trial, a compensation for his capital invested while it was lying idle for the want of the pipe not forwarded in proper time—that is, the legal interest on such capital; also for any workman or hands necessarily unemployed for the same cause, and also for the expenses of sending the machinist after the missing pipe; besides any other damages which were the direct and necessary result of the defendant's negligence.

The effect of the error committed by his honor, in respect to the question of damages, is, that the judgment must be reversed, and a *venire de novo* awarded.

Judgment reversed, and a *venire de novo*.

MEASURE OF DAMAGES AGAINST COMMON CARRIER FOR NON-DELIVERY OF GOODS.—For a case similar in many respects to the one here reported, see *Cooper v. Young*, 68 Am. Dec. 502; examine also the citations in the note 505; also *Nettles v. South Carolina R. R. Co.*, 62 Id. 409; *Cannon v. Folsom*, 63 Id. 474, and notes to these cases.

MEASURE OF DAMAGES FOR BREACH OF CONTRACT is such as may be considered as having been within the view of the parties, and are the direct and necessary result of such breach: *State ex rel. Whitford v. Foy*, 65 N. C. 271; *Mace v. Ramsey*, 74 Id. 15, citing the principal case, which is quoted from in *Roberts v. Cole*, 82 Id. 294, as to the measure of damages for breach of contract. In the latter case, defendant agreed to keep up a division fence, but did not fulfill his contract, whereby plaintiff's crop was very much injured by the ravages of hogs, and the court held that he was entitled to recover such damages as would repair the fence and compensate him for the injury done by the stock before he had time to drive it out and put up the fence.

CASES
IN THE
SUPREME COURT
OF
OHIO.

HIEATT v. MORRIS.

[10 OHIO STATE, 522.]

WHERE PARTIES CONSTRUCT WALL FOR SUPPORT OF THEIR HOUSES on the line of their respective lots, and continue to occupy the same for more than twenty-one years, under an agreement containing no express stipulation as to the continuance or termination of such joint use of the wall, one of the parties may, if he desires to remove the building upon his lot, in order to erect another thereon, notify the other of his intention to remove that portion of the wall standing upon his land, and upon the other party's refusing to suffer or permit such removal, he may proceed to take the wall down, using due and proper care to prevent injury to that part of the wall standing upon the lot of the other party without being liable in an action therefor.

TITLE BY PRESCRIPTION MUST BE SPECIALLY PLEADED.

PRESUMPTION OF GRANT OF EASEMENT arising from twenty years' enjoyment is not conclusive, but may be rebutted.

THE opinion states the facts.

Coffin and Mitchell, for the plaintiff.

I. D. French, for the defendant.

By Court, PECK, J. The declaration discloses that the defendant, being desirous to remove the building upon his lot, in order to erect thereon one better adapted to its increased value, notified the plaintiff of his intention to take down that part of the division wall which stood upon his ground, and upon the plaintiff's refusal to suffer or permit such removal, proceeded to take the same down, using due and proper care to prevent injury to that part of the wall which stood upon

the lot of the plaintiff. This, the defendant, as owner in fee of the ground, had an undoubted right to do, unless he was precluded by the other facts set forth in the declaration. These facts are, the agreement to construct, and the actual construction of a common partition wall for the support of both houses, by the grantors of the plaintiff and defendant, on the line of their respective lots, in April, 1831, and the continued occupancy and common user of such partition wall, by them and their said grantees, up to May, 1852, when the defendant, after notice, removed his portion of the wall. The agreement did not contain any express stipulation as to the continuance or termination of such joint use of the wall; but the plaintiff insists, that it conferred upon him a right to the use of the entire wall for the support of his building for all time, or at least, "until the wall should become unfit for its original purpose," and that neither party could take down his part without the consent of the other.

We have not seen any English case which expressly determines that, in a case like the present, an action could be maintained by the plaintiff, though it is intimated by Little-dale, J., in *Wiltshire v. Sidford*, 1 Man. & Ry. 404, S. C., 17 Eng. Com. L. 675, that neither party would have the right to pull the wall down. But we have been referred to several cases in New York, as to "party-walls," said to be decisive of the point. Strictly speaking, a "party-wall" is one built or supposed to have been built at joint expense and upon ground owned in common, so that each adjoining proprietor has an undivided interest in every part of the wall and the ground on which it stands: Gale & Whatley on Easements, 201; though the term is often applied to designate a mere division wall; and the statutes, in England and New York, denominate a wall built at joint expense and upon the line of two adjoining proprietors, a party-wall.

"Rights to a party-wall may arise in consequence of the special agreement of the party, and in that event, whatever are the provisions of the contract, they govern. In the absence of any agreement, party-walls are generally regulated by the acts of the local legislatures:" 2 Bouv. Inst. 177, 178.

We have not in this state any act regulating party-walls, and consequently the rights and liabilities of the parties in this case must depend upon the provisions of the contract between them and the principles of law applicable to those provisions.

The cases mainly relied on by the counsel for the plaintiff to sustain a recovery in this case are: *Partridge v. Gilbert*, 3 Duer, 184; S. C., 15 N. Y. 601 [69 Am. Dec. 632]; *Eno v. Del Vecchio*, 4 Duer, 53; S. C., 6 Id. 17; and *Webster v. Stevens*, 5 Id. 553.

The cases cited from 3, 4, and 6 Duer are all cases in which the owner of two adjoining lots built a house upon each, with a common partition wall on the line of the two lots, and subsequently conveyed each lot to different purchasers, between whom the controversy arose. In such a case, the right to the use of the entire partition wall would pass by the deed to each grantee as an appurtenance to the house conveyed to him, and is therefore plainly distinguishable from the case before us.

The case cited from 5 Duer, however, is in some respects like the case at bar. In that case, a division wall was erected by two several lessees of lots, upon the line of their respective lots, for the support of houses erected by them respectively, and without any express stipulation as to the continued use; but in that case, the suit was brought some time after the expiration of the leases, by and against subsequent grantees, in fee-simple, of the lessor, on the ground that the easement created by the lessees still attached to the buildings erected by them; and the case was finally disposed of in favor of the defendant, who had removed the wall, for the reason that the easement created by the lessees could not affect the reversioner. The court, however, do say, that "when the owners of adjoining lots construct, by mutual consent, a wall partly on the lot of each, for the common support of the buildings erected by them on their respective lots, and the same is used as a wall for common support for twenty years, such wall is strictly a party-wall, within the legal meaning of that term, and the owner of each has an easement on the portion of the wall standing on his neighbor's land for its support; and that neither could, during the term common to both, claim a right to interfere with the easement of the other in the wall, which they had, by common consent, erected as a party-wall between them." The judge, delivering the opinion, says that the proposition is undoubtedly true, but cites no authority. He terms the right thus acquired "an easement," and seems to base it in part upon the contract, and in part upon the length of time it has been enjoyed. Mere length of time, as such, could not confer the right, because there could not be, in the nature of things, an adverse possession in the case

supposed; and for a similar reason, there being a unity of possession between the dominant and servient tenements, twenty years of common use and enjoyment could not create an easement by prescription: Gale & Whatley on Easements, 86. If any easement was thereby created, it was an "easement of necessity"—that is, one implied by law to carry into effect the intention of the parties: *Id.* 53.

And this seems to be the view of Shankland, J., in *Partridge v. Gilbert*, 15 N. Y. 607 [69 Am. Dec. 632]. The statutes of New York, as to party-walls, may or may not have influenced the decision, but it is clear that the question of easement or no easement must, in this state, depend solely upon the proper construction of the contract set forth in the amended declaration. The agreement as to the wall stated in the declaration is, that the parties, being about to erect dwelling-houses upon their respective lots, agreed to and did build a partition wall for the support of both houses, one half thereof being upon each lot. The parties made no express stipulation as to the duration of the joint use and occupancy of the partition wall, as they well might and perhaps ought to have done. Can the court now do it for them; and if so, how long is it to endure, and when is it to terminate? Must there be mutual consent, or ruinous decay of the wall, before it is taken down? or may it be terminated by either, if his interest or convenience require it? On the one hand, it may be said that the wall was built for the support of the two houses, and the parties must have designed it to remain, so long as either of the houses required its support, and that having been built by mutual consent, and money expended on the faith of its permanency, neither party should arbitrarily terminate it; while on the other it may also be said that it was built for the mutual benefit and convenience of both at the time, and in the absence of express stipulation, should remain no longer than their mutual benefit may require; that it was erected under the state of things then existing, and should not be insisted on when the circumstances are entirely changed; that when the contract was made the ground was suited only for ordinary dwellings, and should be terminated, if either party desire it, whenever fashion or expanded commerce may require its appropriation to marble palaces or extended warehouses.

We think, however, that the contract, like all others, is to receive a reasonable construction to affect the reasonable intent of the parties, deducible from the words employed, as applied

to the circumstances surrounding the contracting parties. If it is unreasonable to confer upon either party the right to arbitrarily terminate it at any time, it is equally unreasonable to permit either, from sheer obstinacy or mere caprice, to insist upon its continuance under a material change of the circumstances. In agreeing to construct the wall, the parties, probably, did not look to the future, but only to the present. Their arrangement had reference to the immediate use, rather than to the future availability of their properties, or the continued use would have been matter of express agreement, and not left to mere construction. The city, then, comparatively in its infancy, was rapidly advancing to the material prosperity it now enjoys, and we can scarcely infer that either party supposed he was creating a permanent incumbrance upon his lot, or a hindrance to its appropriation to other uses, if the rising fortunes of the city should render the change desirable. The declaration shows that the wall was used and enjoyed by the parties for more than twenty-one years; that the improvements by that time had become wholly unsuited to the increased value and capabilities of the property. And we cannot but think that the defendant, after reasonable notice to the plaintiff, might, under the contract, remove his portion of the wall, using due and proper care to prevent injury to the plaintiff, in order to conform his improvements to the changes which time had wrought in the value and availability of the property. We do not hold that the defendant had the right at all times, after building the walls in 1831, to take his part down without the consent of the plaintiff. That, in our judgment, would be as unreasonable as the construction for which the plaintiff contends. All we do hold is, that the facts stated in the declaration do not constitute a cause of action.

The time during which the alleged easement was enjoyed by the plaintiff does not confer a right to its future enjoyment, because that enjoyment was in no sense adverse, and because there was, during the entire period, a unity of possession in the dominant and servient estates. Again, a title by prescription, being a right or authority over the property of another, must be specially pleaded: Stephens on Pleadings, 304 et seq.; which has not been attempted in this case. But again, if a title by prescription was averred as against the defendant, and the mere fact of twenty-one years' enjoyment was relied on to support it, we, as at present advised, should probably hold that such an unbending rule is not adapted to the circum-

stances and existing state of things in this country, as has been repeatedly held in this country in regard to the prescription of the English law as to ancient lights; and as to which, see *Parker v. Foote*, 19 Wend. 318; *Cherry v. Stein*, 11 Md. 7; *Haverstick v. Sipe*, 83 Pa. St. 369; *Napier v. Bulwinkle*, 5 Rich. 323.

It is said by Bronson, J., in *Parker v. Foote*, *supra*, that the presumption of the grant of an easement arising from twenty years' enjoyment, like the presumption of payment of a bond, etc., is not a conclusive presumption, but may be rebutted. Here we have the origin of the right and the precise terms by which it was created, and under which it was enjoyed; and therefore, if this be correct, the claim to its continuance would depend upon a fair and reasonable construction of those terms, and the result would still be the same.

Demurrer to amended declaration sustained, and cause remanded.

BRINKERHOFF, C. J., and SCOTT, SUTLIFF, and GHOLSON, JJ., concurred.

PARTY-WALLS.—When building becomes by age and decay so dilapidated that rebuilding is necessary, its owner may, for that purpose, and on reasonable notice to the adjoining owner, and using due care and skill, take down and rebuild the party-wall without incurring liability to the other owner: *Partridge v. Gilbert*, 69 Am. Dec. 632, and note 642.

TWENTY YEARS' UNINTERRUPTED USER OF EASEMENT is *prima facie* evidence of right to use such easement: *Stuyvesant v. Woodruff*, 47 Am. Dec. 156; *French v. Martin*, 57 Id. 294; *McCoy v. Morrow*, 68 Id. 578; *McArthur v. Carrie's Adm'r*, 70 Id. 529.

CINCINNATI GAZETTE COMPANY v. TIMBERLAKE.

[10 OHIO STATE, 548.]

LIBEL.—FULL, FAIR, AND IMPARTIAL REPORT OF JUDICIAL TRIAL, had in open court, unaccompanied by malicious and defamatory comments, may be published with impunity, and is considered as privileged. But such privilege does not extend to the publication of mere preliminary proceedings, such as an *ex parte* affidavit, made before a proper officer, with a view to the arrest of the party. Such publication can only be justified by proving the truth of the charge.

LIBEL, alleged to consist in the publication of the following article: "Swindling. Amongst the arrests at the Ninth-street station-house yesterday, appeared the name of C. L. Timberlake, who is charged with petty larceny; he having, according

to the statement made, bought a land warrant of a lady for ninety-five dollars, and when the lady had signed the documents, making the warrant over to him, he gave her seventy-six dollars, and would give her no more." The remaining facts are stated in the opinion.

J. L. Miner, for the plaintiffs in error.

C. Fox, for the defendant in error.

By Court, SCOTT, J. There is no doubt that a full, fair, and impartial report of a judicial trial, had in open court, where the parties interested have an opportunity of asserting and vindicating their rights, may be published with impunity. Such reports, unaccompanied by malicious and defamatory comments, have always been held privileged. But the assignments of error, in this case, present the question whether such privilege extends to the publication of mere preliminary proceedings, such as an *ex parte* affidavit, made before a proper officer, with a view to the arrest of the party thereby falsely charged with crime.

In England, an unbroken current of authority answers this question clearly in the negative. A brief reference may properly be made to a few of the cases.

Rex v. Lee, 5 Esp. 123, was a case (tried in 1804) of an information against a printer for a libel, in which counsel for the defense urged "that the publisher of a newspaper had a right to publish a fair account of all public transactions which occurred, and which were matters of public notoriety, provided they were given fairly and impartially; that the paragraphs in question were an account of a matter of public notoriety, and that which he had published was a true report, founded on the depositions, as they had been taken before a justice of the peace; that the paragraphs in question, being therefore a true narrative of public matter, they could not be deemed to be libelous." Having called the clerk of the justices, before whom the depositions had been taken, to prove this part of the case, Justice Heath interfered, saying, "that such evidence was inadmissible; that, putting the criminality of such proceeding out of the question, the evidence offered was *ex parte*; it was the deposition made by the prosecutor only. But he was of opinion that the mere publication of *ex parte* evidence, before a trial, was of itself highly criminal."

The same principle was affirmed in 1811 in the similar case of *Rex v. Fisher*, 2 Camp. 563, where it was said by Lord Ellen-

borough: "Trials at law fairly reported, although they may occasionally prove injurious to individuals, have been held to be privileged. Let them continue so privileged. The benefit they produce is great and permanent, and the evil that arises from them is rare and incidental. But these preliminary examinations have no such privilege. Their only tendency is to prejudice those whom the law still presumes to be innocent, and to poison the sources of justice."

This was a case of information against the publisher of a newspaper for the publication of a preliminary, *ex parte*, deposition of a prosecutrix, in support of a criminal charge.

Again, in 1824, in the case of *Duncan v. Thwaites*, 3 Barn. & Cress. 556, S. C., 10 Eng. Com. L. 255, it was said by Abbott, C. J.: "This court has on more than one occasion, within a few years, been called upon to express its opinion judicially on the publication of preliminary and *ex parte* proceedings, and has on every occasion delivered its judgment against the legality of such publications."

And in 1837, in the case of *Delegal v. Highley*, 8 Bing. N. C. 950, S. C., 32 Eng. Com. L. 398, which was an action of libel for the publication in a newspaper of a police report of proceedings before the lord mayor, against the plaintiff, upon a charge of having fraudulently obtained the signature of a youth under twenty years of age to two blank-stamped bills, it was said by Tindal, C. J.: "There can be no doubt but that the publication of the fact that such an accusation was made is calculated to injure him [the plaintiff] in his good name and reputation; and that the defendant is therefore called upon to justify such publication; and the only justification which the law admits to the publication of an accusation of this nature are two: 1. That the accusation against the plaintiff was founded on facts, which make the charge itself a true charge; and 2. That the publication was justified by the occasion, viz., that it is a true, full, and faithful account of proceedings in a court of justice. The plea in question sets up neither of these grounds of defense. It is merely an assertion that an accusation was made by some third person reflecting on the character of the plaintiff. . . . And still further it appears on this very record that the libel justified is, in fact, a part of a legal proceeding only, viz., the charge which the defendant is not justified in publishing alone."

These cases may suffice to show the strict limitation which, through regard to the protection of private character, is im-

posed by the English courts on the privilege of publishing judicial proceedings. And the same limitation is recognized by the elementary writers: 1 Starkie on Slander, 265; Holt's Law of Libel, 172, 173.

In this country, there seems to have been but few adjudications bearing directly upon the question; and we are aware of none which contravenes the doctrine of the cases cited. On the contrary, it was held by the superior court of New York city, in *Stanley v. Webb*, 4 Sandf. 21, that the publication of *ex parte* preliminary proceedings before a police magistrate is not privileged; and that the publisher must find his justification in such a case, not in privilege, but in the truth of the facts charged. The question was again considered by the same court, in the subsequent case of *Matthews v. Beach*, 5 Id. 256, and the decision in *Stanley v. Webb*, *supra*, was reaffirmed, and declared to rest as well on irresistible authority as cogent reasons of public policy.

In a government like ours, characterized by free institutions, we are by no means disposed to underestimate the importance of a free press. It is doubtless one of the strongest bulwarks of liberty, and the people of this country have ever guarded it with jealous care. By the first article of the amendments to the federal constitution, congress is prohibited from making any law abridging the freedom of speech or of the press. And the framers of our state constitution have thought proper to provide, expressly, in that instrument that "no law shall be passed to restrain or abridge the liberty of speech or of the press." But the same instrument which guarantees to every citizen the right freely to "speak, write, and publish his sentiments on all subjects" declares that he shall also be "responsible for the abuse of the right," and that "every person, for an injury done him in his lands, goods, person, or reputation, shall have remedy by due course of law."

The liberty of the press, properly understood, is not, therefore, inconsistent with the protection due to private character. It has been well defined as consisting in "the right to publish, with impunity, the truth, with good motives and for justifiable ends, whether it respects government, magistracy, or individuals:" Kent, J., in *People v. Crosswell*, 3 Johns. Cas. 337. And this definition of it is embodied in our own state constitution, which provides, that "in all criminal prosecutions for libel, the truth may be given in evidence to the jury; and if it shall appear to the jury that the matter charged as

libelous is true, and was published with good motives and for justifiable ends, the party shall be acquitted." We have no disposition to abridge or restrain the liberty of the press, as thus defined. But, in this case, there is no claim that the charge against the plaintiff below was, in fact, true. The defense rests wholly on the claim of privilege. And if the publisher of a newspaper may, in virtue of his vocation, without responsibility, publish the details of every criminal charge made before a police-officer, however groundless, and whether emanating from the mistake or the malice of a third party, then must private character be, indeed, imperfectly protected. Such publications not only inflict an injury of the same kind with any other species of defamation, but their tendency is also to interfere with the fair and impartial administration of justice, by poisoning the public mind, and creating a prejudice against a party whom the law still presumes to be innocent.

We do not wish to be understood as denying the right to publish, without malice, a fair and full report of judicial proceedings before examining courts, where as in this country, such proceedings are had publicly, in the presence of the party accused, and with full opportunity of defense on his part. This right we neither deny nor assert, for the question is not before us.

It might, perhaps, well be doubted, whether the style and language of the publication, in this case, are such as would, in any case, entitle it to the privilege of a fair and impartial report. By the heading of the article, public attention is called to the supposed transaction as a case of "swindling;" the author of the charge is not named, but receives a general *quasi* indorsement as "a lady," and the plaintiff below is incorrectly said to have been charged by her with "petit larceny."

But, waiving this point, we are satisfied that authority and sound policy alike refuse to extend the privilege here claimed to the publication, in detail, of false and defamatory charges alone, which have been preferred by a proceeding purely *ex parte*; and that such publication can only be justified by showing the truth of the charge.

No exception has been taken, either in the assignment of errors, or in the argument of counsel, to any part of the charge of the court below, except that which relates to the question we have been considering; and in this we think there was no

error, and that the motion for a new trial was properly overruled.

Judgment affirmed.

BRINKERHOFF, C. J., and SUTLIFF, PECK, and GHOLSON, JJ., concurred.

LIBEL.—Party has right, as chronicler of events that actually happened, to report the fact that another has been arrested and held for examination upon a particular charge; but beyond this he cannot go and assume the guilt of another upon an *ex parte* charge, except at the risk of proving the truth of his accusation, when sued for libel: *Tresca v. Maddox*, 66 Am. Dec. 198, and note 203.

PUBLICATION OF JUDICIAL PROCEEDINGS, WHEN LIBELOUS: See *Commonwealth v. Blanding*, 15 Am. Dec. 214; and *Thomas v. Crowell*, 5 Id. 269.

RODGERS v. NILES.

[11 OHIO STATE, 43.]

VENDOR, UPON EXECUTED SALE OF SPECIFIC GOODS, will not be held liable for any defects in the quality of the articles sold, in the absence of fraud or express warranty; but this rule has no application to cases of executory contracts, for the manufacture and sale of goods *in futuro*.

DEFENDANTS AGREED TO MAKE AND DELIVER TO PLAINTIFFS, at a future day, for a stipulated price, three steam-boilers to be used in running the engines in the plaintiffs' rolling-mill: *Held*, that it was impliedly stipulated in the contract that the boilers should be free from all such defects of material and workmanship, whether latent or otherwise, as would render them unfit for the usual purposes of such boilers.

ERROR to the superior court of Cincinnati. Action on contract. Plaintiffs below alleged the making of a contract with defendants, by which defendants agreed, in consideration of a reasonable price to be paid therefor by the plaintiffs, to make for the plaintiffs, out of good and substantial materials, three steam-boilers, of specified dimensions, to be used in plaintiffs' rolling-mills. Said boilers were made and delivered to the plaintiffs, and the price agreed upon was paid therefor. But plaintiffs further alleged that the boilers were not made of good and suitable materials, and after being set up and used by them in their mills for about one month they became leaky, and were totally useless, and had to be thrown aside, and for this breach of contract plaintiffs claimed damages. Defendants admitted the contract to be as claimed by plaintiffs, and the making and delivery of the boilers; but claimed that they were made of good and suitable materials, fit and proper to be

used in the manufacture of boilers. Upon submission of the issues joined to a jury, plaintiffs offered evidence tending to establish the allegations of their petition, and defendants offered evidence to prove that the boilers were well made of good materials; and that if the iron was defective, such defects were inherent defects that could not be discovered by the most careful examination of the material while being manufactured. Plaintiffs then asked the court to charge the jury that "if they were satisfied that defendants engaged, for a reasonable or valid consideration, to build them three boilers to run the engines for their rolling-mill, and agreed to build them, they, the defendants, impliedly agreed that the boilers should be built of good materials, and good workmanship, so as to answer the usual purposes of such boilers." The court refused so to charge, and directed the jury that "any hidden, accidental defect, will not impose a liability on the manufacturer to respond in damages." Verdict having been rendered for defendants, judgment was entered thereon, and affirmed by the court, upon error, at the general term, plaintiffs now seek to reverse this judgment of affirmance, on the alleged ground of error in the charge of the court, and in refusing to charge as requested.

Fox and Fox, for the plaintiffs.

Taft and Perry, for the defendants.

By Court, SCOTT, J. No issue seems to have been raised by the pleadings in this case, in regard to the terms and stipulations, whether express or implied, of the contract on which suit was brought. The defendants, by not denying, admitted the contract to be as claimed by the plaintiffs; and any evidence on that subject was outside of the issue. If the boilers were proved, to the satisfaction of the jury, to be defective, as claimed by the plaintiffs, they would have been entitled to a verdict in their favor. But the plaintiffs themselves offered evidence in relation to the terms of the contract, without requiring an amendment of the answer, and asked to have the jury instructed as to its implied stipulations, and having thus in fact submitted an issue not presented by the pleadings, they would have no right to complain if the law governing that subject was correctly given in charge to the jury.

We proceed, then, to the consideration of the question whether the court below erred in refusing to give the instruction asked and in the instructions actually given.

The general rule of the common law undoubtedly is, that upon an executed sale of specific goods, the vendor will not be held liable for any defects in the quality of the articles sold, in the absence of fraud or express warranty. Where the purchaser is not deceived by any fraudulent representations, and demands no warranty, the law presumes that he depends on his own judgment in the transaction, and applies the maxim *caveat emptor*. But to this general rule the requirements of manifest justice have introduced sundry exceptions, of which some are as well settled as the rule itself, while as to others, the authorities cannot be easily reconciled. We do not propose an investigation of the subject further than is demanded by the case before us. The principal, if not the sole, exceptions to the rule are found in cases where it is evident that the purchaser did not rely on his own judgment of the quality of the article purchased; the circumstances showing that no examination was possible on his part, or the contract being such as to show that the obligation and responsibility of ascertaining and judging of the quality was thrown upon the vendor, as where he agrees to furnish an article for a particular purpose or use. Thus it is said by Mr. Story: "When an examination of goods is, from their nature or situation at the time of the sale, impracticable, a warranty will be implied that they are merchantable. Thus, if goods be at sea, or not arrived; or if they fill the hold of a ship so that nothing but the surface can be seen; or if they be in bales so that an examination of the center cannot be made without tearing each bale to pieces—the seller will be understood to warrant them merchantable, and of the quality demanded and expected by the buyers." Story on Contracts, sec. 834.

It is true that the warranty of merchantable quality has, in several cases, been held to be limited to cases where the examination is impracticable, and not merely inconvenient: *Hyatt v. Boyle*, 5 Gill & J. 110 [25 Am. Dec. 276]; *Hart v. Wright*, 17 Wend. 267. So also the implication of warranty is said not to extend to cases where an examination, though practicable, would be fruitless, on account of the latent character of the defects; but only to those cases in which there can be no examination: 1 Parsons on Cont. 466. The same writer, however, says: "One exception to the rule of *caveat emptor* springs from the rule itself. For a requirement that the purchaser should 'beware,' or should take care to ascertain for himself the quality of the thing he buys, becomes utterly un-

reasonable, under circumstances which make such care impossible."

The vendor's liability on an implied warranty, in the case of articles sold for a particular purpose, is illustrated by the cases of *Jones v. Bright*, 5 Bing. 533; *Brown v. Edgington*, 2 Man. & G. 279; *Beals v. Olmstead*, 24 Vt. 114 [58 Am. Dec. 150]; *Brenton v. Davis*, 8 Blackf. 317 [44 Am. Dec. 769]. Other cases have imposed proper limitations on this doctrine, as in the cases of *Chanter v. Hopkins*, 4 Mee. & W. 399; and *Ollivant v. Bayley*, 5 Q. B. 288. In these cases, it was held that where a "known and ascertained article" is ordered and furnished, though intended for a particular use, the liability of the maker and vendor extends only to defects in the materials and workmanship, and not to such as arise from the principle or mode of construction.

With respect to the doctrine that a sale made for a particular purpose implies a warranty that the thing sold shall be fit for that purpose, it is said in 1 Smith's Lead. Cas. 250, that "the sounder view seems to be that no engagement of this sort can be implied against the vendor, save where the contract is partially or wholly executory; and that in this case it is not in the nature of a warranty, but of an implied stipulation, forming part of the substance of the contract."

And a marked distinction will be found to pervade all the authorities, between an executed sale, where the property passes *in presenti*, and an executory contract for the delivery on a future day, of an article not specifically defined or selected at the time. In the latter case, it makes no difference whether the vendor have an article of the kind on hand, or it is afterward to be procured or manufactured. In neither case can the promisee be compelled to rest satisfied with an inferior article. Though, in the absence of express stipulation, he cannot insist that the article shall be of any special degree of fineness, yet he has a right to insist that it shall be of medium quality or goodness, free from such defects as would render it unmerchantable, or unfit for the purpose for which it is ordinarily used: *Howard v. Hoey*, 23 Wend. 351 [35 Am. Dec. 572]; *Brown v. Sales*, 27 Vt. 227; Story on Contracts, sec. 834; Broom's Legal Maxims, 614. The doctrine is thus stated by the writer last referred to: "Where an agreement is for a specific chattel in its then state. there is no implied warranty of its fitness or merchantable quality; but if a person is employed to make a specific chattel, there the law implies a contract on

his part that it shall be fit for the purpose for which it is ordinarily used:" Broom's Legal Maxims, 614.

It but remains to apply the principles of these authorities to the case under review. The contract sued upon was executory in its character. It was for the making and delivery to the plaintiffs, at a future day, of three steam-boilers, to be used in running the engines of their rolling mill. It must be clear that the rule of *caveat emptor* can apply in no such case, whether the contract be made with a manufacturer, or other person; for the purchaser can exercise no judgment in regard to the quality of a thing not *in esse*, or which is indeterminate, and to be thereafter selected or procured by the exercise of the vendor's sole judgment, discretion, and will. Any rule must be unreasonable which would impute to a purchaser an intention to rely on his own judgment as to the quality of an article, where the circumstances of the case render it simply impossible for him to exercise any judgment whatever.

This is, perhaps, not the case of an article agreed to be furnished for a special purpose. It does not appear that the plaintiffs' mills required boilers of a peculiar quality, and that this was known to the defendants. But they did know that the boilers were intended to be used for the purpose to which they are ordinarily applied; that is, to the generation of steam, to be used as a motive power; and they contracted to build them with reference to this, their usual purpose and use. Whether they were large enough to generate sufficient power for the use of the plaintiffs' mills, at Ironton, was a question upon which the plaintiffs might judge for themselves. They did so, and specified the dimensions; and for any defect in their judgment the defendants are not liable. But the selection and procuring of the materials and the manufacture of the boilers the defendants took upon themselves, and over their action in these matters, the contract of the parties gave the plaintiffs no right of supervision, and no power of control. Under these circumstances, the defendants must be regarded as having agreed to procure such materials, and apply such workmanship as would furnish to the plaintiffs steam-boilers free from all such defects, latent or otherwise, as would render them unfit for the ordinary uses contemplated by the contract.

The question is, then, not one of fraud, but of the performance of the implied stipulations of a contract. It was well known by the defendants, at the time of making the contract,

that the plaintiffs desired to procure steam-boilers, fit, both in material and workmanship, for the use to which such boilers are ordinarily applied. They agreed to supply the plaintiffs' demand in this behalf; and the question is, Have they performed their contract? If they have failed, through defect of material procured by themselves, or of workmanship, their contract is broken, whether such defects be latent or visible, and however honest their intentions may have been.

It has been suggested that the law has been recently held otherwise, by the court of appeals, in New York, in the case of *Hoe v. Sanborn*, 21 N. Y. 552 [*ante*, p. 163]; but a reference to that case will show that, whatever the terms of the contract before the court may have been, it had been pleaded as an executed sale, not as an executory contract. Under the pleadings, therefore, that case was properly regarded by the court as raising only a question as to the extent of the manufacturer's implied warranty, in the case of an executed sale of specific goods. Indeed, the court fully recognized the distinction between the case then before them, and the case of executory contracts, and said, what is evidently true, that the rule of *caveat emptor* was wholly inapplicable to the latter class of cases. This authority, therefore, confirms, instead of conflicting, with the conclusion we have arrived at in this case.

To a majority of the court, it seems clear that the instruction asked by the plaintiff in the court below should have been given, and that the court erred in the limitation and exception specified in the charge given.

The judgment is therefore reversed, and the case remanded.

BRINKERHOFF, C. J., and SUTLIFF, J., concurred.

PECK and GHOLSON, JJ., dissented, on the ground that the facts of the case brought it within the rule stated as applicable to the order of goods from a manufacturer, in a recent decision by the court of appeals in New York, *Hoe v. Sanborn*, 21 N. Y. 552 [*ante*, p. 163]. "The vendor is liable in such cases for any latent defect not disclosed to the purchaser, arising from the manner in which the article was manufactured, or if he knowingly used improper materials, he is liable for that also, but not for any latent defect in the material which he is not shown, and cannot be presumed to have known."

WARRANTY OF QUALITY, WHEN NOT IMPLIED: See *Beirne v. Dord*, 55 Am. Dec. 321; *Wetherill v. Neilson*, 59 Id. 741; *Getty v. Rountree*, 54 Id. 133; *Dickson v. Jordan*, 53 Id. 403; *Brown v. Gray*, 72 Id. 563.

WARRANTY OF QUALITY IMPLIED IN CASES OF EXECUTORY CONTRACTS: *Babcock v. Tryce*, 68 Am. Dec. 560; and see *Emerson v. Brigham*, 6 Id. 115, note.

TO SUSTAIN POINT THAT PARTY SELLING ARTICLES FOR SPECIFIED PURPOSE impliedly warrants that they are fit for that purpose, and free from latent defects, the principal case is cited in *Byers v. Chapin*, 23 Ohio St. 306; *Dayton v. Hoogland*, 39 Id. 682; *Kellogg Bridge Co. v. Hamilton*, 110 U. S. 115; *Gerst v. Jones*, 32 Gratt. 525.

STURGES v. BANK OF CIRCLEVILLE.

[11 OHIO STATE, 152.]

L., AS CASHIER OF DEFENDANT BANK, proposed by letter to sell plaintiffs a bill of exchange drawn by B. & Co. for five thousand dollars, at the price of principal, interest, and exchange. Plaintiffs accepted the proposition by letter, forwarding the money in payment, which L. received and gave credit, as expressed by a letter to plaintiffs, inclosing another bill made by strangers to plaintiffs, indorsed by a stranger "without recourse," for five thousand dollars, charging therefor the same price proposed for the B. & Co. bill. In this letter, plaintiffs were informed that the B. & Co. bill was gone, adding, but this bill "is perfectly safe." Plaintiffs replied by letter as follows: "Your favor with stated inclosure is received, and is very satisfactory." Plaintiffs exercised all due diligence, but failed to collect the bill. *Held*: 1. That the acts of the cashier L., in this transaction, are to be regarded as the acts of the defendant bank by its agent; 2. Written assurance of cashier, which accompanied bill sent to plaintiffs that the bill "is perfectly safe," amounts to a warranty, or representation, on part of defendant in the nature of a guaranty that the bill was collectible.

DISTINCTION BETWEEN WARRANTY AND GUARANTY POINTED OUT.

SUIT brought by plaintiffs in court of common pleas of Pickaway county, and reserved in district court of Pickaway county. The head-note and opinion sufficiently state the case.

C. N. Olds and P. Van Trump, for the plaintiffs.

N. H. and W. Swayne, and H. H. Hunter, for the defendant.

By Court, SUTLIFF, J. Two questions are presented in this case for our consideration: 1. Does the state of facts shown by the correspondence amount to an undertaking or contract upon which a right of action in law could arise in favor of the plaintiffs? and 2. If so, does the proof show such undertaking or contract to be obligatory upon the defendant?

Each of these propositions is denied by the defense. And it is evident that they must both be sustained by the plaintiffs in order to entitle them to recover. For if a valid undertaking, sufficient to give a right of action, was made by the

cashier, professing to act as the agent of the defendant, and duly authorized, when in fact he had no authority, and his act as such agent was not recognized, but repudiated by the bank for whom he assumed to so act, the Bank of Circleville would not, and the cashier alone would be liable upon such unauthorized undertaking by him so made.

It may, therefore, be well to consider first in order the last proposition: Does the proof show the undertaking, negotiation, or arrangement so made by the cashier of the bank with the plaintiffs, according to its terms, obligatory upon the bank?

It is not denied that the acts of the cashier of the bank in the exercise of all of his powers and the discharge of all of his duties, as cashier, would be obligatory upon the bank as the acts of an authorized agent; and would require no ratification or assent on the part of the bank to give them validity as against the bank.

The charter of this bank provides that "it shall be lawful for said bank to loan money, buy, sell, and negotiate bills of exchange, checks, and promissory notes," etc.: 32 O. L. L. 344. But these acts can only be done on the part of the corporation by its agents. And corporations are subject to the same laws in relation to the acts of their agents which are applied to individual persons in regard to the acts of their agents.

It is not claimed that the respective duties of the board of directors, president, and cashier, in the exercise of the franchises of the bank, are prescribed by the charter. So far, therefore, as the limitation of the appropriate duties of the cashier depend upon his office, we can only have respect to the ordinary and well-understood duties of that officer in determining his powers. A cashier is defined to be one who has charge of money, or who superintends the books, payments, and receipts of a bank or moneyed institution. His actual powers and duties, like those of all other agents, may be more or less qualified, restricted, or enlarged by the corporation, institution, or party for whom he acts. But in this case, there being nothing to show any restriction or qualification of his powers in that regard, the duties of the cashier may reasonably be understood to extend to the buying and selling and negotiating bills of exchange, checks, and promissory notes, as well as to that of borrowing money, as the agent of the bank. In the discharge of his duty, he is supposed to be instructed and directed, either generally or specially, by the

bank, either through its board of directors or president, as the case may be.

It is not denied that if the cashier had purchased or sold a bill of exchange, the property in the same might, by the cashier, have been acquired by, or transferred from, the bank; but it is said that he had not the power, by virtue of his office and as such agent, to impose any liability upon the bank, further than to transfer title to and from his principal. If this be so, it would follow that in case the cashier could sell a bill of exchange at par by not guarantying it, and for a large premium by doing so, that, although he knew the bill to be unquestionably good, it would not only be his duty to indorse the same without recourse, and sell at par, but that if he should guaranty the same and sell at a premium, such guaranty would be void. But this could not be claimed on the part of the principal, even in the absence of authority on the part of the agent, after retaining the proceeds of the sale and ratifying the act. In the case before us, there is no evidence that the correspondence was not approved and assented to by the bank at the time, or that the transaction on the part of the cashier was, at any time after, repudiated or even disapproved by the bank.

We have no doubt, therefore, that the acts of the cashier in the transaction are to be regarded as they were by the parties at the time, as the acts of the bank by its agent, and as obligatory upon the principal as if done by itself through any other regularly constituted agency.

There remains, then, to be considered the other question: Does the agreed statement of facts show an undertaking or contract on the part of the defendant upon which a right of action could arise in favor of the plaintiffs?

A guaranty, in its strict legal and commercial sense, is said to be "an undertaking by one person to be answerable for the payment of some debt, or the due performance of some contract or duty by another person, who himself remains liable to pay or perform the same. . . . Originally, the words 'warranty' and 'guaranty' were the same, the letter *g* of the Norman French being convertible with the *w* of the German and English; as in the name William or Guillaume. They are now sometimes used indiscriminately; but in general, warranty is applied to a contract as to the title, quality, or quantity of a thing sold; and guaranty is held to be the contract by which one person is bound to another for the fulfillment

of a promise or engagement of a third party:" 1 Parsons on Contracts, 493. Each is, alike, an undertaking by one party to another to indemnify or make good the party assured against some possible default or defect in the contemplation of the parties. A guaranty is, perhaps, always understood, in its strict legal and commercial sense, as a collateral warranty, and often as a conditional one, against some default or event in future. The term "warranty," on the other hand, is generally understood as an absolute undertaking *in presenti* as well as *in futuro*, against the defect, or for the quantity or quality contemplated by the parties in the subject-matter of the contract. But this contract of warranty, whether qualified and collateral, as applied to the performance of a duty, payment of a debt, or happening of an event, when denominated a guaranty, or unqualified and absolute, as in cases of warranty when applied to the quality or title of things, has alike, in either case, all the characteristics of a contract or undertaking. It must be supported by a sufficient consideration; it must appear to be an agreement of the minds of the two contracting parties to the proposition constituting the contract. The same remark is also equally applicable to each—that no particular form of words is required to express the contract. Any form of words expressing an undertaking, upon a consideration, to insure the other party against the nonpayment or delinquency of a third party may constitute a guaranty. And any affirmation or words, sustained by a consideration, showing an undertaking that the quality or title of the thing sold is such as represented may amount to a warranty. The consideration in each case may arise out of the transaction. In the case of a guaranty, that it was operative to cause the negotiation or acceptance of the paper, and in that of a warranty, that the affirmation or undertaking was operative in causing the purchase, would in each case be a sufficient consideration.

What, then, is the state of facts before us upon the single point to which these general principles apply?

On the eleventh day of November, 1854, the plaintiffs submitted to the defendant a written proposition to purchase a certain bill of exchange held by the defendant against Buckingham & Co., on Adams & Buckingham, for five thousand dollars, paying therefor principal, interest, and exchange.

The defendant replies, on the fifteenth of November, that the defendant does not then hold that bill, but returns a propo-

sition to sell to the plaintiffs similar bills drawn by Buckingham & Co., of Toledo, for the same amount, on like terms, due November 24th.

On the twenty-first of November, the plaintiffs accept this proposition of defendant, and forward the money in compliance on their part.

Thus far, it is evident that both the parties regarded the negotiation as being for a "perfectly good" bill; and principal, interest, and exchange were to be paid as the agreed price. The defendant barely mentions the names of the parties to the bill, and the plaintiffs accept the proposition upon their own knowledge, without question as to the responsibility of the parties.

But the defendant accepts the plaintiffs' compliance with their proposition, retains the full price paid to them, and on the fourth of December, by letter, acknowledges the receipt of principal, interest, and exchange, and attempts a performance on its part of its own proposition—not by sending the bill which defendant had proposed to sell, and for which defendant had so received the price; nor by returning the money, or offering to do so, and opening a negotiation for the sale of some other bill. But the defendant sends another bill made by entire strangers to the plaintiffs, indorsed by a stranger, and that "without recourse," and impart to it full credit on the part of plaintiffs by an attendant written assurance or affirmation that it "is perfectly safe." This is the language of the defendant's letter containing the bill sent to the plaintiffs upon the subject: "The Buckingham bills I propose to give you are gone, but this bill is perfectly safe."

And upon receipt of the bill and the assurance of its quality by the defendant, the plaintiffs reply: "Your favor of the the fourth instant, with stated inclosure, is received, and is very satisfactory." This consummated the contract, as understood by the parties. But how was it consummated? The defendant proposed to sell the Buckingham bills, and it was those only which the plaintiffs agreed to buy, and for which payment was made by plaintiffs, and received and retained by the defendant. Very true, says the defendant; but the plaintiffs, by their letter of December 7th, just referred to, express their assent to accept the bill of Jefferson Fulton, instead of the Buckingham bills of like amount. There is nothing in the letter, I think, to authorize such a conclusion. The plaintiffs did not say, and there is nothing to induce the sup-

position that they would have said that the bill sent them was of itself a satisfactory equivalent for the one withheld, and for which they had paid. All the circumstances going to show that the plaintiffs were unacquainted with the parties to the bill, it is not to be presumed that the defendant would have sent, or the plaintiffs have accepted, the bill in place of the Buckingham bills, without an assurance of its being of the same value. But we are not left to conjecture upon this point. The defendant did not presume to send the Fulton bill as a compliance of the contract on its part, without an accompanying written assurance; and the plaintiffs only accepted it with such assurance. "Your favor," say they, "with stated inclosure, is received, and is very satisfactory." What was the stated inclosure? The Fulton bill, by the bank stated or vouched to be "perfectly safe." That favor simply credited plaintiffs the full price of the Buckingham bills, told them those bills were gone, and added, "but this bill is perfectly safe." And this favor, meaning obviously this explanation, and their assurance of the goodness of the bill, forwarded with the bill, the plaintiffs say "is very satisfactory."

Here, then, is a positive affirmation on the part of the defendant, in relation to a bill of exchange offered to the plaintiffs, that it is perfectly safe. On the strength of that representation, defendant asks, and the plaintiffs pay for the bill of five thousand dollars, the sum of five thousand and fifty dollars.

It is admitted that after the exercise of all due diligence on the part of the purchasers, the plaintiffs, the bill has proved to be defective of the quality for which it was sold. It was not such a bill as the defendant assured, or affirmed to the plaintiffs at the time of the sale. Now, if a like representation had been made and acted upon in the sale and purchase of a personal chattel, I apprehend there would be no difficulty in arriving at the conclusion that the representation so made by the vendor was clearly a warranty.

But the distinction already alluded to, between a guaranty and warranty, renders the application of the term "guaranty," in its strict legal and commercial sense, perhaps, inapplicable to this case. For although bills of exchange are bought and sold like personal property, and the word "warranty" might be applied not improperly to the title of the holder, the warranty accompanying their transfer, as to their quality, generally has respect merely to the payment of the debt which the bill or note evidences, and is called a guaranty. These facts, however, are

apparent in the case. The defendant offered to sell the bill, and at a premium price, under a positive affirmation that it was "perfectly safe;" and on that representation of its quality, the plaintiffs, in full confidence, having no other means at hand to know, bought the bill, and paid such premium price; and this representation, so made and received, has proved untrue. It matters nothing, I apprehend, that the defendant honestly regarded the bill safe. The defendant affirmed it to be so, and it is not admissible for it to now qualify that undertaking. And although this representation is not in the strict language or form of a guaranty, it is difficult for me to perceive how it does not substantially comprehend at least an assurance of the collectibility of the bill. The term "perfectly safe," when applied to commercial paper, must at least mean that the paper is collectible. Short of this, it cannot properly be said to possess the quality of being "perfectly safe."

Having respect, therefore, to the substance of the transaction between the parties, and the common and well-understood meaning of the language used by the defendant and accepted by the plaintiffs, a majority of the court are clearly of the opinion that the same constituted an undertaking on the part of defendant, upon which a right of action in law has accrued to the plaintiffs.

It is not material whether this undertaking be called a warranty, or whether we term the affirmation of the defendant a representation in the nature of a guaranty; the substance of the transaction is the same. In either case, it was an undertaking which the defendant had a right to make, and the plaintiffs to accept and rely upon. And we think sound principles of law, as well as good morals, require that the same should be held obligatory between the parties.

Nor can this undertaking be invalidated by the doubts which seem to have been expressed afterward by the plaintiffs, whether the same could be enforced in law.

Judgment must therefore be entered for the plaintiffs.

BRINKERHOFF, C. J., and SCOTT, J., concurred.

PECK and GHOLSON, JJ., dissented.

OFFICE AND DUTIES OF CASHIER OF BANK: *Merchants' Bank v. Rawls*, 50 Am. Dec. 394. Cashier of bank is the agent of the corporation, and his acts are governed by the general rule for agents, that if they exceed his authority they do not bind his principal: *State v. Commercial Bank*, 45 Id. 280.

BALDWIN v. SNOWDEN.

[11 OHIO STATE, 202.]

CERTIFICATE OF ACKNOWLEDGMENT IN REGULAR STATUTORY FORM, of deed of conveyance executed by husband and wife, is, in the absence of fraud, conclusive evidence of the facts therein stated.

DELIVERY BY HUSBAND OF DEED REGULARLY EXHIBITED AND ACKNOWLEDGED by himself and wife, and acceptance by the grantee, in good faith, bind the wife, although such delivery was made by the husband without the knowledge of the wife.

FAILURE OF HUSBAND TO DISCLOSE TO WIFE CHARACTER OF MORTGAGE executed by her at his request, she being ignorant of its contents, is not such fraud as will enable her to contradict, by parol, the certificate of acknowledgment, the grantee being absent, and having no notice of any imposition.

ACTION to enforce lien of mortgage executed by the defendants, Snowden and wife, and delivered by the defendant Snowden, to secure the payment of certain promissory notes made by him. The mortgage was acknowledged in due form before a proper officer, and the acknowledgment certified by him. The defendant, Mrs. Snowden, answered, alleging that, as to her, there was never any valid delivery of said instrument purporting to be a mortgage; that she never authorized her husband, or any one else, to deliver it to any one; that there never was any delivery of said instrument, and that the same was void as to her. She further alleged that said instrument was obtained by imposition and in fraud of her rights, and was, therefore, void; that she signed it in ignorance of its contents, and was not examined in respect to it by the notary, either in the presence of, or separate from her husband; and that the fact that the instrument was a mortgage, was kept entirely secret from her. The mortgagee was not, however, charged with any participation in, or knowledge of the imposition alleged. The circumstances of the case more fully appear in the opinion.

N. H. and W. Swayne, and Geiger and Andrews, for the plaintiff.

P. B. Wilcox, for the defendant, Mrs. Snowden.

By Court, SCOTT, J. The demurrer of the plaintiff presents the question of the sufficiency of the answer of Mrs. Snowden, as a bar to the plaintiff's action.

This answer denies the validity as to Mrs. Snowden, of the mortgage, the lien of which the plaintiff seeks to enforce, upon two grounds: 1. Because it was never delivered by her; and

2. Because it was obtained by imposition and in fraud of her rights.

We propose first to consider the latter branch of the answer.

The facts which constitute the alleged fraud and imposition are fully and minutely stated in the answer, and directly impeach the truth of the notary's certificate of acknowledgment.

The answer does not charge the mortgagee, or his assignee, with any participation in, or knowledge of the fraud alleged to have been practiced on the respondent. Nor does it directly impugn the good faith of the notary, otherwise than by averring that he did not, as he has certified, make known to her the contents of the mortgage deed. She does not even charge her husband with any misrepresentation, or intentional deception. It is true, she says, that the fact that the instruments which she signed were mortgages was kept entirely secret from her, but this, when taken in connection with the facts stated, cannot be understood as importing more than an averment that she was not informed of their character. She complains of no artifice, no act done, or word spoken, either by her husband or the notary, calculated to deceive her. Her allegations of fraud are evidently a mere inference which she draws from the facts stated. And yet those facts are entirely consistent with honesty of purpose, both on the part of the notary and her husband. When asked by her husband to sign the papers which had been prepared for the purpose, she did so without question or hesitation. She did so because she had full confidence in her husband. If, in the fullness of conjugal affection, she was willing to abide by the judgment, and conform to the wishes of her husband, without asking any questions, it would seem unreasonable that she should now seek to relieve herself from the consequences of that confidence, at the expense of others who were less confiding, and guilty of no fault. Her ready compliance with her husband's wishes in signing the mortgage in the notary's presence, without inquiry or objection, would naturally impress him with the conviction that she was fully apprised of the contents of the instrument which she was executing.

Under such circumstances, the averments of the answer cannot be understood as importing a charge of intentional or actual fraud on the part of the notary. How soon after the execution of the mortgage she learned its true character is not shown by the answer; but it may be fairly presumed, in the absence of any averment to the contrary, that under the influence of the

caution given by her mother, who witnessed its execution, she soon made the proper inquiries, and was fully informed as to what she had done. Yet no intimation appears to have been given of any dissatisfaction, on her part, until her husband had obtained the full benefit of the time given by his creditors, on the faith of the mortgage, and they, thereupon, proceeded to enforce their lien. But, be this as it may, and supposing her husband to have been guilty of fraud, in not disclosing to her the character and effect of the deed which she signed without inquiry, yet the notary is charged with no complicity in this fraud, or with any intentional deception. And there is no suggestion that the mortgagee was in any way privy to, or cognizant of any imposition. Can she, under these circumstances, impeach the certificate of the officer? If so, then such certificate is, at most, but *prima facie* evidence of the facts which it purports to verify. But this, we think, would contravene the policy of the law. The title to real estate would generally be insecure, if the official certificate of a magistrate, authorized by statute to examine, as to the execution of a deed, and to certify the acknowledgment of the grantors, could not be relied on as conclusive. The certificate of acknowledgment is an essential part of the conveyance, and without it the title cannot pass. And we think it can no more be contradicted by parol than any other part of the deed. It is true, the deed may be impeached and set aside for fraud. But that fraud must be something more than a breach of the confidence reposed by one of the grantors in the other. Where the grantee does not participate in the fraud, and is not cognizant of it, nor of any circumstances which would put an honest and prudent man upon inquiry, and has acted on the faith of the conveyance, we apprehend it cannot be set aside on the ground of fraud. Thus in *Schrader v. Decker*, 9 Pa. St. 14, it was held that "the acknowledgment of a deed, by husband and wife, for the wife's land, may be shown to have been obtained by fraud and duress of the wife, and thus avoided as to volunteers, or purchasers with notice, *aliter* as to *bona fide* purchasers without notice." So, in *Louden v. Blythe*, 16 Id. 532 [55 Am. Dec. 527], S. C., 27 Id. 22, where it was held that "the certificate of the magistrate is conclusive in favor of one who accepted it in good faith, and paid his money, without knowing or having reason to suspect it to be untrue. But that if the certificate be false in fact, and the mortgagee knew it, or knew of circumstances which would put an honest and

prudent man upon inquiry, then it may be contradicted by parol evidence."

In the case last cited, the mortgage was set aside, not simply because the magistrate taking the acknowledgment knew that the wife's acknowledgment was induced by undue influence on the part of the husband, but because the mortgagee was also present and knew enough to put him upon inquiry. In *Hartley v. Frosh*, 6 Tex. 208, it is said that "where the certificate of the privy examination of a married woman is in due form, in order to impeach its veracity, it is not sufficient to allege that there was no privy examination, that the contents were not made known to her, etc.; the certificate is conclusive in the absence of an allegation of fraud or imposition; as, for instance, that there was a fraudulent combination between the notary and the parties interested." We doubt whether a case can be found where the certificate of the magistrate has been allowed to be impeached, on the ground of fraud, without evidence charging the grantee with notice of the fraud, or the officer taking it with complicity therein

We are satisfied, therefore, that the facts stated in the answer in this case would not warrant the introduction of parol evidence to contradict the certificate of the notary.

But the respondent further avers that she never delivered, nor authorized her husband to deliver, the mortgage deed, upon which suit is brought. She does not deny the fact that it was signed and sealed by her; nor that it was delivered by her husband; and if she is conclusively bound by the certificate of acknowledgment, which shows her knowledge of its contents, and the purpose for which it was intended, and if, with this knowledge, she permitted her husband, without objection or inquiry, to take and use it according to his own judgment, then she has no right to complain that he delivered it in accordance with its terms and manifest purpose. Under such circumstances, a delivery by him must bind her as well as himself. The grantee may properly regard her execution and acknowledgment of the instrument as evidence of her consent to its delivery; and if, without notice of her dissent, it is delivered by the husband, she cannot afterward be permitted to question his right to do so, without allowing a fraud to be practiced against the grantee. Were it otherwise, a large majority of all the deeds executed by husband and wife within this state have never been delivered by the wife, and would not bind her.

It is quite true that a deed of conveyance is inoperative till delivered, and that if a conveyance of the wife's land, executed by husband and wife be not delivered till after the wife's death, when her estate is vested in her heirs, their estate cannot then be divested by a delivery by the husband, without their consent. Such is the doctrine of the case of *Shoenberger v. Zook*, 34 Pa. St. 24, cited by counsel. That decision was no doubt correct, but does not touch the present case. One much more nearly in point is that of *Ackert v. Pultz*, 7 Barb. 386, in which it was held that "where husband and wife execute a deed, and deposit it as an escrow, to be delivered on the execution of a bond and mortgage, the husband's consent to the delivery of the deed to the grantee without a performance of the condition will bind the wife."

Many authorities might be referred to bearing more or less directly on the several defenses set up in this answer, and sustaining the views we have expressed: *McLure v. Colclough*, 17 Ala. 89; *James v. Fisk*, 9 Smed. & M. 145 [47 Am. Dec. 111]; *Aikin v. Morris*, 2 Barb. Ch. 140; *Jamison v. Jamison*, 3 Whart. 469 [31 Am. Dec. 536]; *McNeely v. Rucker*, 6 Blackf. 391.

We think that the demurrer to the answer must be sustained, and the case remanded to the district court for further proceedings.

BRINKERHOFF, C. J., and SUTLIFF, PECK, and GHOLSON, JJ., concurred.

ACKNOWLEDGMENT OF DEED BY MARRIED WOMEN: See *Mason v. Brock*, 52 Am. Dec. 490; *Warren v. Brown*, 57 Id. 191; *Hughes v. Lane*, 50 Id. 436; *Livingston v. Kettelle*, 41 Id. 179, note. Impeaching certificate of acknowledgment: See *Jamison v. Jamison*, 31 Id. 536. Parol evidence may be admitted to show that acknowledgment of mortgage by married woman was not made by her of her own free will and accord, but was extorted from her by fraud and imposition: *Louden v. Blythe*, 55 Id. 527.

THE PRINCIPAL CASE IS CITED in *Williamson v. Carskadden*, 36 Ohio St. 666, to the point that the certificate of the officer taking the acknowledgment of a deed, where the grantor actually appears before him is, in the absence of fraud, conclusive evidence of the facts therein stated.

STRANG v. BEACH.

[11 OHIO STATE, 283.]

MISTAKE IN ATTEMPTED DESCRIPTION OF MORTGAGED PREMISES, in a mortgage of land, which has been duly executed and recorded, will be corrected in equity, not only as against the mortgagor, but also as against judgment or attaching creditors of the mortgagor and purchasers under them with notice of the mistake.

PETITION by plaintiff, a judgment and attaching creditor, praying that the claim of the defendant Beach, under a mortgage to the land in controversy be "barred." The petition alleged that said defendant acquired no interest, as against the plaintiff, because said mortgage was without consideration, and made in fraud of creditors. Defendant answered, alleging that the mortgage was not made in fraud of any one, but was executed in good faith, and to secure the payment of large sums of money advanced; and by cross-petition, stated in addition that, by mistake, the land in controversy was described in the mortgage as "two and a half rods of land west of the center of," etc., and that the description should have read "commencing at a point two and a half rods west of the center of," etc. Defendant claimed that these mistakes were unknown to him or to his mortgagor, until after the commencement of this suit; but that the plaintiff, at the time he issued his attachment, had knowledge of them, and of all defendant's rights in the land; and he prays that he may be decreed to hold the land free from the lien of the plaintiff, and for general relief. The mortgage was duly executed and recorded, and the fact of mistake and the fact of notice are admitted.

S. Burke, for the plaintiff.

S. J. Andrews, for the defendants.

By Court, BRINKERHOFF, C. J. It is very evident that, taken literally as it stands, the attempted description contained in the mortgage does not afford the means of identifying any land whatsoever; for it furnishes no place of beginning—no starting point. But, if we prefix the words "beginning at a point," or some equivalent expression, and drop the words "of land," then, by an ordinary and allowable reference to the extrinsic circumstances stated in the cross-petition, the description will become sufficiently definite and intelligible. And the question is made and discussed by counsel in argument, whether, in accordance with established rules of construction

and the suggestions of approved precedent, this may not be done. But on this point the members of the court would probably find it difficult to agree; and we therefore pass it over, and proceed upon the assumption of the correctness of what the plaintiff claims, to wit, that the attempted description in the mortgage is so uncertain as to render it impossible, by means of it, to identify the land attempted to be described.

On this assumption, and admitting that there is a mistake in the description, which cannot be corrected by construction, the defendant Beach contends that the court ought to give effect to the clearly ascertained intentions of the parties, by reforming the mortgage or by dealing with the case as if the mortgage were reformed. On this question, we find no serious difficulty.

It will be noticed that we are not embarrassed by any question of fact, nor by any question as to the amount or degree of evidence necessary for the proof of any fact. The cross-petition alleges, and the demurrer admits, the fact of mistake, and that the plaintiff, at the time he caused his attachment to be issued, had knowledge of the mistake, and of all Beach's rights in the land. The fact of mistake and the fact of notice are admitted by the demurrer.

Now, if this were a case between the parties to the mortgage alone, it is settled by a uniform current of decisions in Ohio that this mortgage would, on the admitted mistake, as between them, be reformed: *Davenport v. Sovil*, 6 Ohio St. 459, and cases there cited. And aside from our own peculiar statutory provisions in respect to mortgages, and the holdings of our courts under them, it seems to be equally well settled, by decisions of courts of high authority in neighboring states, that, on general principles of jurisprudence, "courts of equity will interfere to correct mistakes, not only between the original parties, but also those claiming under them in privity, as heirs, legatees, devisees, assignees, voluntary grantees, judgment creditors, or purchasers from them, with notice of the facts:" *Adams's Eq.* 406, No. 1; 1 *Story's Eq. Jur.*, sec. 165. *Simmons v. North*, 3 *Smed. & M.* 67, is a strong case directly in point on this question; and the same may be said of *Wall v. Arrington*, 13 *Ga.* 88, and *White v. Wilson*, 6 *Blackf.* 448 [39 *Am. Dec.* 437]; see also *Gouverneur v. Titus*, 6 *Paige*, 347; and *Whitehead v. Brown*, 18 *Ala.* 682. The reasoning on which these cases go is this, that there is a clear equity in favor of the vendee or mortgagee, as the case may be, as against his mortgagor or

vendor, on the ground of which a court of equity will interfere to correct the mistake; that a judgment or execution creditor of such vendor or mortgagor, with notice of such equity, or a purchaser at a sale under execution, with like notice, stands in the shoes of the vendor or mortgagor, and so can have no better right or higher claim than the debtor himself would be permitted to assert.

But one question then remains; and that is, whether, on the state of fact alleged in the cross-petition and admitted by the demurrer, a court of equity in this state will be precluded by our peculiar legislation from granting the relief prayed for.

By the first section of the act of February 22, 1831, "to provide for the proof, acknowledgment, and recording of deeds and other instruments of writing" (3 Curwen's R. S. 2448), it is provided that, when any competent person "shall execute, within this state, any deed, mortgage, or other instrument of writing, by which any land, tenement, or hereditament shall be conveyed, or otherwise affected or incumbered in law, such deed, mortgage, or other instrument of writing shall be signed and sealed by the grantor or grantors, maker or makers, and such signing and sealing shall be acknowledged by such grantor or maker in the presence of two witnesses, who shall attest such signing and sealing, and shall subscribe their names to such attestation; and such signing and sealing shall also be acknowledged by such grantor or grantors, maker or makers, before" certain officers therein named.

By the seventh section of said act, it is provided "that all mortgages executed agreeably to the provisions of this act shall be recorded in the office of the recorder of the county in which such mortgaged premises are situated, and shall take effect from the time when the same are recorded," etc. And by a subsequent act of March 16, 1838, "declaratory of the laws upon the subject of mortgages," it is provided "that mortgage deeds do and shall take effect and have preference from the time the same are delivered to the recorder of the proper county, to be by him entered on record:" 1 Curwen's R. S. 430.

Under the express and peculiar phraseology of these statutes, a series of authoritative decisions have been made in this state, holding that such mortgages only as were signed, sealed, witnessed, and acknowledged in accordance with the provisions of the first section of the act first above referred to, were

entitled to be recorded, or could be recognized as having been delivered for record or recorded; and that none but mortgages, so executed and delivered for record or recorded, could have any effect whatsoever, either at law or in equity, as to third parties, whether such third parties had notice of the defectively executed or unrecorded mortgage or not: *White v. Denman*, 16 Ohio, 59; *Bloom v. Noggle*, 4 Ohio St. 45; *Erwin v. Shuey*, 8 Id. 509; *White v. Denman*, 1 Id. 110. In this last-named case, the court say that the correctness of these decisions has been much questioned; that they are at variance with the former analogies of the law; and the judge delivering the opinion of the court declares, that if the question "had not been determined by adjudication in this state, and affirmed and adhered to for a number of years, a majority of this court would feel constrained to take a different view of it;" yet, inasmuch as it had become a rule of property in settling priorities among creditors, the court, acting on the maxim *stare decisis*, would not disturb it.

Now, for these reasons, we will not disturb the rule thus established. It has the merit, at least, of simplicity, and of being well known and understood. But the question before us is, not whether we will disturb the rule thus established, but whether we shall enlarge the rule, and extend its operation to a case not within the letter of the statutes, and clearly distinguishable from any which have heretofore been held to be within these statutes. The rule is a statutory rule; and the cases referred to proceed in obedience to what were deemed the unbending and imperious requirements of a legislative enactment. These statutes relate solely to the mode of execution, and the recording of the mortgage; a mistake in these respects, it is settled, cannot be corrected; but, as to all mistakes and defects of the instrument, in other respects, the statutes are entirely silent, and upon them the decisions which have been made upon questions arising under these statutes have no bearing.

As to the due and formal execution and recording of the mortgage in the case before us, no exception is taken; in these respects it is admitted to be perfect. And it seems to us, therefore, that we are not only at liberty, but are required, to stop where the statutes stop; and as to a mistake in an attempted description of mortgaged premises—which is a matter not covered by the statutes—to resort again to the general doctrines of equity jurisprudence, on which our statutes are an admitted innovation.

This view of the case overrules the demurrer to the cross-petition.

Demurrer to cross-petition overruled, and cause remanded, with leave to plaintiff to answer cross-petition.

SCOTT, SUTLIFF, PECK, and GHOLSON, JJ., concurred.

POWER OF COURT OF EQUITY TO CORRECT MISTAKE IN DEED: See *Leiten-dorfer v. Delphy*, 55 Am. Dec. 137, and note. Mistake in description of premises in deed, construction: *Melvin v. Proprietors*, 38 Id. 334; *Clark v. Munyon*, 33 Id. 752. Correction of mistake in mortgage: *Ames v. N. J. F. Co.*, 72 Id. 385.

THE PRINCIPAL CASE IS CITED in *Conover v. Porter*, 14 Ohio St. 454, as to construction of registry act. And in support of the doctrine of *stare decisis* it is cited in *Hillabiddle v. State*, 35 Id. 56; *Arrowsmith v. Harmoning*, 42 Id. 261. It is cited to the point that a mortgage has no effect, under the statute, either in law or equity, as against subsequently acquired liens, until its execution according to the statute, and its delivery to the recorder of the proper county for record, in *Bundy v. Iron Co.*, 38 Id. 312; and in *Hutteman v. Dassel*, 40 Id. 293, to the point that if the name of the grantee be omitted from a mortgage by mistake or inadvertence, the defect may be corrected by *pro rata*.

HOWE v. HARTNESS, HILL, & Co.

[11 OHIO STATE, 449.]

DEFENDANTS, A BANKING COMPANY, issued a certificate of deposit for four thousand dollars in currency, to plaintiff's debtor, payable in like funds to the order thereon of the depositor, with interest: *Held*, that the certificate is to be regarded as a negotiable promissory note, notwithstanding the term "currency" was deemed at time and place of transaction to include the bank bills of sundry specie-paying banks outside the state, as well as those of the same character within the state.

REASONABLE TIME MUST ELAPSE FOR PURPOSE OF NEGOTIATION, or presentment for payment, before negotiable certificate of deposit will be regarded as overdue, and it will not be so regarded two days after its date, when negotiated to a party receiving it in good faith, for a valuable consideration.

ASSIGNMENT OF NEGOTIABLE CERTIFICATE OF DEPOSIT CAN ENFORCE PAYMENT by the maker thereof, and the latter cannot be held liable to an attaching creditor of the depositor.

PLAINTIFF brought suit against one Markham, a non-resident of the state, and prosecuted the same to final judgment. Writ of attachment was issued, at the commencement of the suit, and garnishee process was served on the defendants by which it was sought to hold a certificate of deposit issued by the defendants to Markham in the following terms: "Hartness, Hill, & Co., bankers, Cleveland, Ohio, May 12,

1856. \$4,000. F. C. Markham has deposited in this bank four thousand dollars in currency, payable in like funds, to the order hereon of himself, with ints. Hartness, Hill, & Co." This certificate was negotiated to the Peninsular Bank, in good faith, and for good consideration. The opinion states other facts clearly presenting the case.

S. J. Andrews, and Mason and Estep, for the plaintiff.

Willey and Carey, for the Peninsular Bank.

H. Griswold, for Hartness, Hill, & Co.

By Court, SCOTT, C. J. The certificate of deposit issued by the defendants, Hartness, Hill, & Co., to the plaintiff's debtor, contains an unconditional promise to pay to the order of F. C. Markham four thousand dollars in currency, with interest, upon presentation of the certificate, either by himself or his assignee. Such is clearly the legal import of its terms; and there can be no doubt that it possesses all the characteristics of a negotiable promissory note, unless the fact that it is payable in currency affects its negotiability. The question, then, is, whether a note drawn for a specified sum payable in currency is a note drawn for a sum of money, within the meaning of the statute.

In *Dugan v. Campbell*, 1 Ohio, 115, it was said by the court that the term "currency" means current money, where this interpretation is not controlled by the positive terms of the contract.

This authority might, perhaps, have justified the court below in excluding evidence explanatory of the term "currency" in this case. But the plaintiff was permitted to show that the term "currency," at the time and place of the contract, was understood to mean bank bills of sundry specie-paying banks, which were then received and paid out by the banks in Cleveland; and he claims that bank bills are not money. The question, then, is, Can bank bills of specie-paying banks which circulate through community as and for money, and perform all its offices, be considered by courts as money, within the meaning of the statute? Unquestionably, they are, strictly speaking, but promises to pay money. They are not a legal tender. No one can be compelled to receive them as money. But we cannot shut our eyes to the fact that in the commercial and business transactions of every-day life, they circulate as money throughout the community, and are,

by general consent and usage, so treated and received. In the language of Lord Mansfield, in *Miller v. Race*, 1 Burr. 457, "they are not like bills of exchange, mere securities, or documents for debts, nor are so esteemed; but are treated as money in the ordinary course and transaction of business by the general consent of mankind; and on payment of them, when a receipt is required, the receipts are always given as for money, not as for securities or notes." In New York, it has been held that a note payable in York state bills was the same as being made payable in money: *Keith v. Jones*, 9 Johns. 120. And in *Judah v. Harris*, 19 Id. 144, it was held that a note payable in bank notes current in the city of New York, was a negotiable note. Upon this question, it is true, conflicting decisions are to be found.

But in Ohio it has been quite uniformly held that promissory notes may be negotiable, though payable in current bank bills, and that such bills are money, within the meaning of the statute. In *Morris v. Edwards*, 1 Ohio, 189, it was held that a contract to pay two thousand dollars in current bank notes of the city of Cincinnati is a contract to pay money; and in that case, it was said by Judge Hitchcock that "a note drawn for a sum certain, payable in bank paper, is negotiable." The question was pretty fully considered in that case, which may be regarded as a leading one on the subject in this state. The same principle was followed, and controlled the decisions in the subsequent cases of *Swetland v. Creigh*, 15 Id. 118, and *White v. Richmond*, 16 Id. 5; in the former of which, it was held that a note payable in current Ohio bank notes is a note payable in money; and in the latter, that a note payable in current funds of the state of Ohio is a note for a sum certain, within the meaning of the statute, and negotiable. And the reasoning of the court in all these cases makes the rule applicable not merely to Ohio bank bills, but to all such bank notes as, by general usage and consent, are regarded by community as money. In the case last cited, it was said by Judge Birchard, delivering the opinion of the court, "the supreme court of this state have, on the circuit, repeatedly held that a note payable in current bank notes was payable in money, and negotiable; and the authority of our own court, for many years, should not be departed from, when no evil is seen to grow out of its adjudications on this subject."

On a question affecting the character of commercial paper, we do not feel at liberty to overrule these repeated adjudica-

tions, and ignore the general understanding of the business community. And so long as the general consent of mankind, in all business transactions, gives to current bank bills the character of money, we see no good reason why courts, when the question is presented in a commercial point of view, should regard them otherwise.

But it is claimed that the certificate, if negotiable, was overdue when negotiated to the Peninsular Bank. This position, we think, cannot be maintained. In England, a promissory note, payable on demand, with interest, does not become overdue by mere lapse of time: *Barough v. White*, 4 Barn. & Cress. 325; S. C., 10 Eng. Com. L. 345. But in this country, a note payable on demand, unless indorsed within a reasonable time, is considered as overdue and dishonored. What shall be regarded as reasonable time must depend to a great extent on circumstances. In *Ranger v. Cary*, 1 Met. (Mass.) 369, it was held that one month would not be unreasonable time. In the present case, the certificate was drawn bearing interest, showing that immediate presentation for payment was not contemplated by the parties. It was drawn and dated at Cleveland, and negotiated by the payee to the Peninsular Bank, at Detroit, where the payee resided, on the second day after its date. It could not have been offered for negotiation at Detroit earlier than the preceding day. There was clearly no such lapse of time as should have put the Peninsular Bank upon inquiry, or would justify a court in regarding the paper as overdue when negotiated.

The facts stated in the answer of the garnishees in the attachment suit, and which the court below has found to be true, clearly show that at the time of service of process upon them under the attachment proceedings, the certificate had passed completely beyond their control. It had been deposited in the post-office, in an envelope directed to Markham, the payee, in pursuance of his orders. This was, in law, a delivery to him, and the certificate thereby became his absolute property. It is true that Hartness, Hill, & Co., the garnishees, were, at the time, indebted to Markham; but their indebtedness was evidenced by a negotiable promissory note, then in his possession, and which, within a reasonable time, he might transfer so that his assignee would have the right to demand and enforce its payment by the makers. It was so negotiated by the payee, within two days after its date, and received by the Peninsular Bank, in the regular course of business, in good faith, and for

a valuable consideration. As such assignee, the Peninsular Bank was not chargeable with constructive notice of the proceedings in attachment then pending. In the case of *Stone v. Elliott*, 11 Ohio St. 252, we have held that the doctrine of *lis pendens* does not apply to negotiable paper before due. And the garnishees being, therefore, liable to the assignee, the court below properly held that they could not be made liable to account for the same debt to the attaching creditor, under the section 205 of the code.

Judgment of the court below affirmed.

SUTLIFF, PECK, GHOLSON, and BRINKERHOFF, JJ., concurred.

THE PRINCIPAL CASE IS CITED in *Secor v. Witter*, 39 Ohio St. 233, to the point that the right of the plaintiff in attachment is liable to be defeated by one who, before due, without actual notice of the proceedings in attachment, becomes the *bona fide* holder of a negotiable instrument.

PHILLY v. SANDERS.

[11 OHIO STATE, 400.]

A ENTERED INTO POSSESSION OF LAND UNDER AGREEMENT to purchase from B, the owner, and made valuable improvements, in 1848. In 1849 he executed a mortgage of the land to C, to secure the payment of a note made to C for six hundred dollars, payable in 1850. In 1851 he received a deed of conveyance in fee from B, and in 1854 executed a mortgage of the land to D, to secure the payment of a note made by him for one thousand eight hundred dollars. Deeds were all duly recorded. The mortgages not being paid, and the lands being insufficient to satisfy both mortgages. *Held*: 1. That mortgage to C, as between the parties, conveyed to C the legal possessory right of the grantor, and his equitable interest in the lands; 2. Upon execution of the deed by B to A, the fee so conveyed to A, by estoppel arising from his prior deed of warranty in fee to C, inured to C, who, as between the parties, thereby became vested with the fee; 3. That the obligation of estoppel became to C a muniment of title, adhering to and transmissible with the land, and obligatory upon the grantees of A, as well as upon his heirs; 4. That the deed to C, having priority of record of the deed to D, was entitled to the same respect in law and equity as against D that it was entitled to against B, his grantor.

CIVIL action. Reserved in district court of Warren county upon an agreed statement of facts. The case is stated in head-note, and opinion.

J. K. O'Neill, for the plaintiff.

Durbin Ward, J. D. Wallace, and Lauren Smith, for the defendant, Mrs. Sanders.

By Court, SUTLIFF, J. It is claimed, on behalf of the plaintiff in this case, that by force of the statutes relating to the recording of mortgages in this state, the record of the mortgage of Mary Sanders cannot be regarded as constructive notice to Owens, at the time of the execution of the mortgage to him, and of its being recorded.

It is provided by the act for the proof, acknowledgment, and recording of deeds and other instruments of writing, passed February 22, 1831, as follows:

Sec. 1. "That when any man or unmarried woman, above the age of twenty-one years, shall execute, within this state, any deed, mortgage, or other instrument of writing, by which any land, tenement, or hereditament, shall be conveyed, or otherwise affected or incumbered in law, such deed, mortgage," etc., shall be executed as thereby directed.

Sec. 7. "That all mortgages executed agreeably to the provisions of this act shall be recorded in the office of the recorder of the county in which such mortgaged premises are situated, and shall take effect from the time when the same are recorded," etc.

The question then arises, Was the mortgage executed to Mary Sanders and recorded on the twenty-third of April, 1849, to be regarded on the fourteenth of July, 1854, when Owens received his mortgage, as a mortgage within the meaning of the provisions of section 7 of the statute?

It is argued, from these two provisions of our statute, that the mortgage contemplated by section 7 must be one by which the land is "affected or incumbered in law;" and that inasmuch as David A. Sanders, at the time of executing the mortgage to Mary Sanders, had only an equitable title to the land, the land was neither affected nor incumbered thereby. If it be true that the first mortgage deed was not included by the words "deed, mortgage, or other instrument of writing, by which any land, tenement, or hereditament shall be conveyed or otherwise affected or incumbered in law," which are each and all authorized to be recorded, the recording of the instrument would not, by force of the statute, be constructive notice of its existence.

But, on the other hand, if the first mortgage, at the time of the execution of the subsequent mortgage to Owens, was a mortgage or instrument of writing, by which the land was "affected or incumbered in law," it was such a mortgage as expressed in section 7, and as is thereby provided, "shall be

recorded;" and the record thereof in such case would necessarily be constructive notice of the same to the subsequent mortgagee, Owens, at the time of the execution of the mortgage to him.

Let us, then, recur to the facts of the case, to ascertain the true character and legal effect of the mortgage to Mary Sanders. Was it an instrument by which the land, on the fourteenth day of July, 1854, was "affected or incumbered in law?"

The instrument is in the usual form of a deed, conveying the land to the grantee, Mary Sanders, in fee-simple, with the usual covenants of warranty by the grantor, David A. Sanders, subject only to the condition of defeasance that the same should become void upon the grantor's paying to the grantee the sum of six hundred dollars, evidenced by his note of that date, payable one year from the date thereof, and dated January 24, 1849. It is true that at the time of executing this deed, David A., the grantor, though in the possession of said land, was not then vested with the fee-simple title. He had only the legal possessory title, or right of possession *in præsenti*, and the further equitable title, or right of the fee-simple title *in futuro*, upon paying the remainder of the purchase-money. The grantor, however, by the terms of his deed, assumed to convey the land in fee-simple, and expressly covenanted that the said grantee, her heirs and assigns forever, should hold the same free from all incumbrances, and that the title so conveyed was "clear, free, and unincumbered, and that he will warrant and defend the same against all claims whatsoever." In January, 1850, when the note had become due, and remained unpaid, what then was the effect of this deed upon the land, as between the parties? Certainly the same, in law, as if there had been no condition expressed therein. The condition upon which it was to become void, not having been complied with, was gone at law, and the deed of conveyance had become absolute; and as between the parties the same was, in law, just as operative as if, at its execution, the grantor had been, in fact, vested with a title in fee-simple.

In an action of ejectment, the proof of the execution of the deed would have entitled the grantee to a judgment for possession of the lands against the grantor; and under such judgment, she could have taken actual possession, and have succeeded to the right and enjoyment of the premises as fully as possessed by him at that time.

But the precise time to which we should have respect to determine the character of the first mortgage, is that of the execution of the second mortgage. The real question is, Was the mortgage of Mary Sanders, on the fourteenth day of July, 1854, when Owens was about to take his mortgage on the same land, a deed, mortgage, or instrument by which the land was then conveyed, affected, or incumbered in law? And this question, like the former, is to be answered by reference to the parties to the first mortgage, and its subject-matter, the land, and at the time immediately preceding the execution of Owens's mortgage. Was or was not the title of David A. then affected by his mortgage executed in January, 1849, to Mary Sanders? On the twenty-second day of May, 1851, David A. received a conveyance in fee-simple of this land, which he had already conveyed in fee-simple by deed of warranty to Mary Sanders. Both those deeds, as between the parties, were in full force previous to Owens's receiving his mortgage. How then stood the title? Applying the familiar principle that a grantor with warranty is estopped by his grant from setting up against his grantee, any after-acquired title to the lands granted or conveyed, by the language of his prior deed, and as between these parties, Mary Sanders might, by virtue of her prior deed, in law claim and hold the hands in fee-simple: *Bond v. Swearingen*, 1 Ohio, 395. See also the case of *Allen v. Parish*, 3 Id. 187, to the same effect. In which case, Burnett, J., pronouncing the opinion, says: "By the uniform course of decisions, both English and American, the grantor was estopped, by his deed, from setting up a title under the patent; neither could his heirs, nor any person claiming under him, question the title of the grantee on the ground that the patent was subsequent in date to the deed."

It is, therefore, evident by the test insisted upon, that not only was the first mortgage an instrument executed in the form and manner prescribed by section 1 of the act to convey or incumber lands, but it was an instrument of writing by which the land had, in fact and law, been conveyed and affected, as between the only parties having any title, interest, or estate in the land, at the time of Owens so receiving his mortgage. The first mortgage was, therefore, at that time, a proper instrument to be recorded, and required to be so recorded, by said section 7, of the statute, to give it effect. Its record was, therefore, even if not constructive notice to strangers, all that the statute required to give the first mortgage at that time full operative effect, as between the parties.

This is not a case where the question of priority of equities between a former and subsequent mortgage depends upon notice, either actual or constructive, on the part of the second mortgagee. Such a question might have arisen if the latter mortgagee had derived title immediately from Keck & Clements. But such is not the case; Owens received his mortgage from David A. Sanders, who had already executed his conveyance by warranty deed more than five years before to Mary Sanders; and had himself acquired a perfect legal title about three years previous to making his mortgage to Owens. This title so, then, acquired by David A., inured to his former grantee, making as between himself and his future grantees or heirs and her, the title of Mary Sanders as perfect as if he had held a perfect title in fee-simple at the time he so executed to her the said mortgage. Such was the situation of the title of David A., and such the character of the title of Mary Sanders on the fourteenth day of July, 1854.

What title, then, did David A. Sanders at that date convey by his deed to John W. Owens? It is obvious that he could not convey any greater title than he then held; whatever language he may have used in the deed could no more enlarge the title than the quantity of the land beyond that which he actually held. But we have seen that by his former conveyance and subsequent receipt of title, and the doctrine of estoppel applying to the case, full force and effect in law had already been given to his former deed to Mary Sanders. And the force and effect of the estoppel is, in law, just as binding upon a subsequent grantee as it is upon the grantor; and upon either it is equally obligatory with the language of the deed creating the first grant or conveyance. An obligation of estoppel binds, not only the grantor in such a case, but his heirs and subsequent grantees, and all persons privy to him. It adheres to the land, and is transmitted with the estate, whether the same passes by descent or purchase. And the estoppel becomes, and forever after remains, a muniment of the title so acquired; and when the party so estopped conveys the land, he necessarily conveys it subject to such estoppel in the hands of his grantee.

It follows, therefore, from this view of the case, that independent of the question of notice, the mortgage of Mary Sanders is as obligatory upon Owens, the grantee, as it was upon his and her grantor, David A., at the time of the execution of such second mortgage; and its obligation as a mortgage

upon the grantor, David A., is not questioned, and certainly cannot be.

A majority of the court are clearly of opinion that full effect should be given to the mortgage to Mary Sanders, and that hers is, in law and equity, the prior lien upon the proceeds of the sale of the lands.

Judgment entered accordingly.

SCOTT, PECK, and BRINKERHOFF, JJ., concurred.

GIBSON, J., dissented.

AN. DEC. VOL. LXXVIII—61

CASES
IN THE
SUPREME COURT
OF
PENNSYLVANIA.

PENNSYLVANIA RAILROAD COMPANY v. OGIER.

[85 PENNSYLVANIA STATE, 60.]

FEATURES OF NEGLIGENCE in regard to the specific grounds of complaint may be proved so clearly and incontestably that it may become the duty of the court to pronounce it such as a matter of law; but where the facts are controverted, and the existence or non-existence of them may fairly be presumed to affect the mind in a given exigency, the question whether the acts were or were not negligent is necessarily one for the jury.

NEGLECTANCE IS WANT OF ORDINARY CARE which a party ought to observe under the peculiar circumstances under which he is placed.

WHEN THERE IS CAUSE TO APPREHEND DANGER, a greater degree of care is required than when no danger is expected.

ONE CANNOT TAKE ADVANTAGE OF HIS OWN WRONG, where he has omitted to perform a duty, and by that omission another has been lulled into a fancied security, so that he goes into a dangerous place and receives an injury which he might have avoided if the other had performed his duty. Such other person in such case will not be permitted to charge contributory negligence on the injured party.

IT IS NOT ERROR if the court adds to its instruction to a jury, "much is left, and much must always be left, to your sound discretion," if otherwise the instructions are without error. It is better, however, not to add such words.

IN error. The action was to recover damages of the defendants for negligently, etc., causing the death of plaintiff's husband by running the defendants' train into his carriage while he was driving along a public road known as the "Tun road." When he arrived near the point where the railroad crossed the Tun road, he stopped and listened for the train, and not hearing it, went on; the train passed while his horses and carriage were on the track, killing him and his horse, and smashing

his carriage. The railroad and highway were so situated that neither could be seen from the other for more than a few feet from the crossing. The whistle of the engine was not blown when the train was approaching the crossing. Among other things, the court charged the jury as follows (the portions excepted to are in italics): "There are three other points on this subject furnished to me by the defendants' counsel, which I may as well notice in this place: 1. 'If Dr. Ogier, deceased, as he approached the railroad, before his horse reached the north track thereof, could have seen the train approaching at the distance of six hundred feet, it was his duty to stop until the train had passed, and not endanger his own life, as well as the lives of the passengers on the train, by attempting to cross the track in advance of the train;' 2. 'The evidence is clear and uncontradicted that Dr. Ogier could have seen the train approaching before he reached the track, in time for him to stop his horse and avoid the collision;' 3. 'The evidence upon this point is conclusive proof of negligence on the part of Dr. Ogier; is binding upon the jury, and precludes a recovery in this action.' *These propositions, if affirmed as they stand, would take from the jury what it is your province to determine.* I am not clear, from the evidence, as to the exact condition of things at the instant before the collision. To measure the distance by time, it would seem that the train, when first seen, or when it first could be seen, was but seventeen seconds from the center of the Turn road, although the actual distance, according to one witness, was six hundred and thirty-four feet. It was the undoubted duty, according to my apprehension, of Dr. Ogier, as he approached the railroad, to look along the track, notwithstanding he had satisfied himself at the break on the hill that no train was approaching. If in looking eastward he saw the train approaching, at a time and under circumstances which enabled him to stop his horse, he should have done so; and it was negligence not to do it. If he really attempted to cross the track in advance of the train, after having seen it approaching, it was negligence in him; it was a want of proper care and prudence, and the plaintiff cannot sustain her action. *I will not take the facts from you. How the doctor got on the north track, whether from the fright of the animal he was driving, whether from want of instant decision how to act, or in the deliberate attempt to pass before the train, is not and cannot be known. From the position in which he was placed when he first could have seen the approach of the train, it is a reasonable con-*

clusion to draw, that he was in peril, and must have acted upon impulse rather than judgment. I would not call an error in the mode of relieving himself from danger either negligence or want of care. Under the circumstances attending the collision, I should not be willing to judge of the conduct of the doctor by the ordinary rules which govern the actions of men. All, therefore, which I can say upon these propositions is, that from the evidence it seems clear the doctor could have seen the train at the distance of six hundred feet before he reached the north track, and that if he deliberately attempted to pass before it, and in doing so was killed, there was negligence on his part, which must destroy the right of action. In examining this part of the case, you will draw your conclusions as reasonable men, from all the circumstances which surrounded Dr. Ogier, and regarding the rule of common sense and common prudence, will say whether or not there was negligence on his part. If there were, this action cannot be sustained. I am requested by the plaintiff to say to you that 'if, after having used ordinary care, such as prudent men generally do, in passing over the railroad at the crossing, Dr. Ogier was placed in a state of peril by the negligence of those having charge of the train, the defendants are responsible for the consequences which ensued, though the jury may believe that the peril may have been increased by an effort made to avoid it, or that it might have been lessened or escaped by the exercise of unusual courage and self-possession, and instant resort to the proper expedient.' This is affirmed for the foregoing reasons, and the jury will judge from the testimony of the weight which it applies to the point in issue." After adding some other instructions, which are not claimed to be erroneous, the court added: "*Much is left, and much must always be left, to your sound discretion.*" The jury found a verdict of ten thousand two hundred and fifty dollars for the plaintiff, Mrs. Ogier.

W. Darlington, Cuyler, and Bell, for the plaintiffs in error.

J. J. Lewis and J. P. Wilson, for the defendant in error.

By Court, THOMPSON, J. There may, undoubtedly, be cases in which the only facts proven may present so clearly and incontestably features of negligence in regard to the specific ground of complaint, that it may become the duty of the court to pronounce it such as a matter of law. Such, for instance, as the rapid running of a train of cars around curves, at crossing-places, over the railroad, without notice of any kind: *Reeves v. Delaware etc. R. R. Co.*, 80 Pa. St. 454 [72 Am.

Dec. 713]. So, in the exit of a passenger from the cars, on an opposite side from that of the platform provided for his safe and convenient egress, under no controlling necessity for doing so: *Pennsylvania R. R. Co. v. Zebe*, 33 Id. 318; and many other cases that might be imagined. But in cases of controverted facts, the existence or non-existence of which may fairly be presumed to affect the mind, in a given exigency, there the question of the character of the acts, whether negligent or otherwise, is necessarily for the jury. Such, we think, was the case here. The theory that the deceased might have seen six hundred and twenty-three feet along the railroad, in the direction in which the train was approaching, from a point at which he might have stopped the progress of his horse and escaped danger, but did not see it until within one hundred and seventy-four feet of him, if considered abstractly, and entirely unshaken by any or every other consideration, would have presented a strong case of negligence; but even then it would scarcely have justified a court in saying there was negligence as a matter of law, when but seventeen seconds were allowed for action to the party in danger. But there were other considerations to be taken into account here. If there was no notice by blowing the whistle, a thing required to be done before reaching the point, and usually done, a traveler accustomed to expect this would not only not be so likely to look out for danger, or be in such a preparedness to avoid it, as he otherwise might have been, and this without any culpable negligence on his part. For, if by the negligence or omission of those in charge of the train, his vigilance was allayed, they are not at liberty to impute the consequence of their acts to his want of vigilance, a quality of which they deprived him. If their acts brought him within the boundaries of peril, they must answer for the results of that condition. If, therefore, he had a right to expect to hear the whistle sounded at a sufficient distance from the crossing, and did not, it is evident a different degree of care or vigilance might follow. Care is, undoubtedly, a relative term, or, rather, conveys a relative idea as to the degree necessary to be observed under circumstances. It is different, certainly, when there is reason to apprehend danger, from that degree to be exercised where it is not to be apprehended. Here, it may have made a great difference: It seems to me that if the evidence had satisfied the jury that the whistle had been sounded at the usual place, and the cars had been running at the usual speed, the defend-

ants would not, as the case stood, have been guilty of negligence. But the fault of negligence on one or the other side, depended much on this fact. It was in view of this controverted point, that the court were bound to leave the question of negligence on part of the deceased to the jury, against the prayer for instruction to rule it against the plaintiff as a matter of law. We think they did right in doing so. Nor do we see any error on part of the court, in their instructions on the duty of care arising out of the situation of the company and the deceased, or the consequence of it on the part of one or both. This was all fully and fairly explained to the jury.

The last assignment of error has been carefully considered. The court, after substantially laying down the rule administered by this court in *Pennsylvania R. R. v. Zebe*, 33 Pa. St. 318, added, "much is left, and much must always be left, to your sound discretion." If this sound discretion was sufficiently explained to be circumscribed by the rule of damages applicable to the case, we must presume that the jury so understood it; we can do nothing else. If understood in that sense, it could do no harm. Was this so? The learned judge had before told the jury that the measure of damages to which the plaintiff would be entitled, if entitled to any, was to be "what the plaintiff had lost in a pecuniary point of view, by the death of her husband, namely, a reasonable support and subsistence for herself;" that "nothing was to be given for grief, for mental sufferings, for lacerated feelings, or disappointed hopes, because these cannot be compensated by money." In connection with the remark complained of, the judge said: "But while making the estimate of the value of the life of the deceased, which you have a right to do, and the consequent damage which the plaintiff has suffered by the death, 'much is left, and much must always be left, to your sound discretion;'" and in the conclusion of the charge, he defines this discretion to be "a fair and reasonable discretion, based upon the law and evidence." To intelligent minds, these instructions were certainly not incompatible with the rule laid down as the basis upon which to estimate the damages. We cannot, and will not, presume that the jury were other than intelligent men. They were not an accidental part of the tribunal of justice. Juries are an institution of the fundamental law of the land, and we, as a court of error, can predicate nothing of their errors, or call that an error of instruction which to us is intelligible and right. If the remark were less guarded

than it is, we might be obliged to reverse, and we certainly would do so if we could see that it had the effect to impair the rule that had been correctly exhibited to the jury in the charge.

It is said that a similar remark is to be found in the case of *Pennsylvania R. R. Co. v. Zebe*, 33 Pa. St. 318. So it is. But the object of our remarks in that case was cautionary. We were reasoning of its propriety to courts; of the necessity of adhering to it; for even then, there would be "much still to be left to the sound discretion of the jury." And we added, "whatever is susceptible of a pecuniary estimate is included within it, and what we have seen was not to be included must be excluded." It was within this limitation the discretion was to be exercised. We intended to invite no escape from the rule, and no court ought so to administer it as to create a doubt about what the rule of compensation is to be. When the rule is accurately stated, it is enough; more may not be error, but this case is a proof that it will always be claimed to be so, even when, after a close investigation, it may be found not to be so; and this demonstrates the propriety of laying down the rule in its plainest and simplest form, consistent with a clear exposition of it. Giving the charge in this case a fair and natural interpretation, we see no error in the points complained of, and the judgment must be affirmed.

Judgment affirmed.

AS TO MEASURE OF DAMAGES, and the charge of the court concerning it to the jury, the principal case is cited with approval in *Philadelphia etc. R. R. Co. v. Adams*, 89 Pa. St. 36.

NEGLECT IS FAILURE TO PERFORM PLAIN DUTY, and where it is a plain case of neglect of duty the court may so declare: *P. C. P. R. Co. v. Hassard*, 75 Pa. St. 377; *McKee v. Bidwell*, 74 Id. 223; *Empire Trans. Co. v. Wamsutta Oil Co.*, 63 Id. 17; *P. & C. R. R. Co. v. McClurg*, 56 Id. 297, all citing the principal case.

IT IS DUTY OF TRAVELER on a highway, when approaching its intersection with a railroad, to look out for approaching trains. His failure to do so is not merely evidence of negligence, but negligence *per se*: *Schum v. P. R. R. Co.*, 107 Pa. St. 12; *N. P. R. R. Co. v. Heileman*, 49 Id. 64, both citing the principal case. One who is conscious of a danger must use due precaution in trying to avoid it. If there is a failure in this, the party is guilty of contributory negligence, and cannot recover for an injury suffered by reason of such neglect of duty: *City of Erie v. Magill*, 101 Id. 621; *P. R. R. Co. v. Fortney*, 90 Id. 326.

DAMAGES FOR NEGLIGENCE cannot be recovered, if it appears that the injury the plaintiff sustained was in any degree caused by his own negligence or want of care: *Murch v. Concord R. R. Corp.*, 61 Am. Dec. 631, and note

642; *Dumont v. New Orleans etc. R. R. Co.*, Id. 214, and note 217; *Chicago etc. R. R. Co. v. Patchin*, Id. 65, and note 71, 72; *Reeves v. Delaware etc. R. R. Co.*, 72 Id. 713, and note 720, 721.

CONCURRENT NEGLIGENCE OF PASSENGER, when railroad company is also negligent, will not excuse the latter: *P. R. R. Co. v. Kilgore*, 72 Am. Dec. 787, and note 788; *Adams v. W. F. Co.*, Id. 247, and note 251.

CHILDREN ARE NOT BOUND TO SO STRICT RULE in regard to negligence as are adults: *Rauch v. Lloyd*, 72 Am. Dec. 747.

INSTRUCTIONS AS TO NEGLIGENCE: See *Reeves v. Delaware etc. R. R. Co.*, 72 Am. Dec. 713.

EISENLOHR v. SWAIN.

[85 PENNSYLVANIA STATE, 107.]

MEASURE OF DAMAGES, in an action against the proprietors of a newspaper for neglecting to insert an advertisement of a public sale, for which they had collected the publication fee in advance, is the sum paid them for such publication, if there was no fraud on their part. Speculative damages are too remote.

CERTIFICATE from the court of *nisi prius*. Amicable action of *assumpsit*. Plaintiff owned an island in the Delaware river which he proposed to sell, and directed an advertisement to be put in defendants' newspaper on two certain days, and paid them for it in advance. The first insertion of it was correctly made, but the advertisement was left out on the second day that it was to be inserted in the paper. The court instructed the jury that the defendants were liable only to refund the price paid for the advertisement. To this instruction plaintiff excepted.

The COURT. What was said by the judge at *nisi prius* was a sufficient answer to the plaintiff's demand for speculative damages in this case. The defendants having failed, through mistake or accident, and without fraud, to publish the plaintiff's notice according to contract, he was entitled to recover back the advertising fee he had paid, and that the verdict gave him.

The judgment is affirmed.

SPECULATIVE DAMAGES CANNOT BE RECOVERED: Note to *Griffin v. Colver*, 69 Am. Dec. 724; *Patch v. Covington*, 66 Id. 186, and note 191, 192; *Worcester v. Great Falls Mfg. Co.*, Id. 217.

KLAUDER v. McGRATH.

[35 PENNSYLVANIA STATE, 123.]

JOINT TORT-FEASORS ARE JOINTLY LIABLE for injuries which result from their concurrent negligence. This is not to be confounded with cases of trespass brought for separate acts done by two or more persons. If there has been no concert of action, no common intent, there is no joint liability.

THE facts are stated sufficiently in the opinion.

F. C. Brewster, for the plaintiffs in error.

D. Dougherty and Sellers, for the defendant in error.

By Court, STRONG, J. The plaintiff below declared against the defendants for an injury which she had received, in consequence of the fall of a party-wall negligently sustained by them. The basis of the action was the negligence of the defendants. It is contended now, that they could not be held jointly liable. The maintenance of an insecure party-wall was a tort in which they were both participants. The act was single, and it was the occasion of the injury to the plaintiff. It is difficult, therefore, to see why both were not liable, and liable jointly. The case is not to be confounded with actions of trespass, brought for separate acts done by two or more defendants. Then, if there has been no concert, no common intent, there is no joint liability. Here, the keeping of the wall safe was a common duty, and a failure to do so was a common neglect. The rule often recognized is, that when an injury has resulted from the concurrent negligence of several persons, they are jointly responsible. Thus, if a passenger be injured by a negligent collision of the trains of two railroad companies, he may maintain one action against both: *Colegrove v. New York & H. and N. Y. & N. H. R. R. Cos.*, 6 Duer, 382. So, an action may be maintained jointly against towns for an injury resulting from the insufficiency of a bridge which both towns are under obligation to maintain: *Peckham v. Burlington*, Brayt. 184.

The judgment is affirmed.

WHERE JOINT TORT-FEASORS CONCUR in the performance of a single act, they are jointly liable: *L. S. N. Co. v. Richards's Adm'r*, 57 Pa. St. 148, citing the principal case; *Moir v. Hopkins*, 63 Am. Dec. 312, and note 315; *Richardson v. Emerson*, 62 Id. 694, and note 696.

RUDY v. COMMONWEALTH.

[35 PENNSYLVANIA STATE, 166.]

STATUTE IN PENNSYLVANIA GIVES SHERIFF POWER TO SEIZE AND TAKE MONEY IN EXECUTION only "when he can find no other real or personal estate of the defendant," and even then, he is not to take the money from the person of the defendant. Under such a statute, if a person delivers money to a sheriff, who holds two executions against said person, with a direction to apply it upon the execution last received by the sheriff, it must be so applied, and the prior execution creditor has no right to have it applied on his prior execution. If ordinarily the sheriff could seize money thus placed in his hands and apply it to the prior execution, he could not do so while he had real estate levied upon by virtue of such prior execution and undisposed of in his hands.

UNSIGNED RETURN OF SHERIFF IS ADMISSIBLE IN EVIDENCE in an action against him, and binds the sheriff the same as if it had been properly signed.

WHEN SHERIFF HAS TWO EXECUTIONS IN HIS HANDS against the same defendant, at the same time, he is bound to apply any levy he makes, whether of goods or money, to that writ which first came into his hands, giving the second the benefit of any surplus that may remain after satisfaction of the first.

IN error. This was an action of debt by the commonwealth of Pennsylvania for the use of J. B. Stevenson against the plaintiff in error, Rudy, a sheriff upon his official bond. Rudy received two *fi. fas.*, or executions, against one Koffel. Upon the prior one of these, he had levied upon personal property of Koffel and sold it. It being insufficient to satisfy this prior execution, the sheriff levied upon the realty of Koffel and was proceeding to sell it also. Koffel paid to him two hundred and forty dollars in money, and directed him to pay it to the second execution creditor, which he did and returned the said junior writ indorsed as follows: "Sheriff for \$220.23 of principal and costs. So answers ——— Sheriff." Judgment was for the commonwealth. The other facts are sufficiently stated in the opinion.

Boyd and Chain, for the plaintiff in error.

Mulvany, for the defendant in error.

By Court, **WOODWARD, J.** The two hundred and forty dollars could not have come to the sheriff's hands before he received the Stevenson execution, because that question, fairly submitted to the jury, was found for the plaintiff. Under the instructions of the judge, which are contained in the third, fourth, and fifth assignments of error, the question is, then,

whether all that occurred amounted to a "seizing and taking" of that sum in execution by the sheriff. If it did, he made a false return of Stevenson's *fi. fa.*, for he should have applied the money to that writ. There can be no doubt that when a sheriff has two executions in his hands against the same defendant at the same time, he is bound to apply any levy he makes, whether of goods or money, to that writ which first came into his hands, giving the second the benefit of any surplus that may remain after satisfaction of the first. But can money, voluntarily paid to a sheriff with directions to hand it over to a specified creditor, be said to have been seized and taken in execution by the sheriff? If in any case it can be, the question that arises here is, whether it can be considered a seizure upon an execution that shows a levy and sale of personal property, and a levy undisposed of on real estate? The act of sixteenth of June, 1836, gives the sheriff authority to seize and take money in execution only "when he can find no other real or personal estate of the defendant," and even then, he is not to take the money from the person of the defendant.

Now the sheriff having, on the twenty-seventh of May, sold the defendant's goods to an amount greatly less than the Stevenson execution, there was nothing in the fact of that levy to prevent his seizure, three days afterwards, of money on the same execution; but the levy on real estate not having been disposed of, would seem to present an insuperable obstacle to his seizure of money on the thirtieth of May. If the act of assembly means what it says, he was in no condition to seize coin, for he had taken land, and it could not appear, except by a sale, that the levy was insufficient to satisfy the debt. Is he to be held liable for a false return because he did not do that which the statute forbade? He made no false return of the plaintiff's writ if he did not, and could not levy that writ on the money in question; and that he could not is as certain as that he could not set aside the act of assembly.

Independently of this view of the case, we should have difficulty in considering it a seizure and levy at all, if the sheriff had not concluded himself on that point by his return of the writ of Brock, Emery, & Co. If Koffel, the debtor, gave the sheriff the money to carry to the attorney of his creditor, it was a trust, which the sheriff had better, perhaps, have declined, but which, being undertaken, he was bound to execute. To seize and take is an aggressive act on the part of the officer; to receive by the voluntary payment of the debtor, and to

carry the money to be deposited according to the debtor's directions, is altogether unlike the official act. Whilst the money remained in Koffel's hands he had the sole control of it. The sheriff could not take it from his custody by virtue of his office. Koffel might apply it to whichever creditor he pleased. And if he sent it by the sheriff, as his messenger, to Brock, Emery, & Co., the sheriff, no more than any other messenger, could violate his trust to the prejudice of Koffel's right of application. But the sheriff has precluded himself from standing on this ground by returning the money as made on Brock's execution. That return, though unsigned, was properly admitted in evidence, and under all the circumstances in proof, we think the sheriff was properly held responsible for it. But what did it prove? Only that he had applied the money to the later writ instead of the earlier. But if the act of assembly forbade him, in the circumstances of the case, to apply it to the earlier writ, then the plaintiff in that writ has no reason to complain. So is the act written that it would have been a breach of official duty, as well as of private trust, to apply that money to the plaintiff's writ, though it was first in the sheriff's hands. He ought not, therefore, to have been held responsible to the plaintiff. There was no error in holding Mr. Fox a competent witness.

The judgment is reversed, and a *venire facias de novo* is awarded.

SHERIFF'S RETURN SIGNED, "A. Drum, sheriff, by H. Stark, deputy," is sufficient: *Emley v. Drum*, 36 Pa. St. 125, citing the principal case.

UNSIGNED RETURN INDORSED ON SUMMONS IS SUFFICIENT, but it may be amended, and a judgment by default founded thereon is not void: *Desar v. Spence*, 65 Am. Dec. 241, and note 247.

RETURN MADE BY DEPUTY SHERIFF, not signed in the sheriff's name, is void: *Id.* 247. A failure to sign a return otherwise regularly made is not *ipso facto* void, in Pennsylvania: *Id.*

SUBJECT OF AMENDMENTS OF RETURNS is discussed at length in note to *Malone v. Samuel*, 13 Am. Dec. 173; see also *Crocker v. Mann*, 26 *Id.* 684, and note.

EXECUTION FIRST LEVIED MUST BE FIRST SATISFIED, though the officer has in his hands at the time an execution of older date: *Johnson v. Gorham*, 65 Am. Dec. 501; *Million v. Commonwealth*, 36 *Id.* 590.

EXECUTION LIEN, FROM WHAT TIME BINDS PROPERTY: Note to *Johnson v. Gorham*, 65 Am. Dec. 503.

MILLER v. McNEILL.

[36 PENNSYLVANIA STATE, 217.]

IN ATTESTATION OF WILL, the order of signing is immaterial so long as the signing by the witnesses and testator was all done at the same moment and in the same presence. The English law is more exacting than ours, hence the decisions under it are not authority here.

IN error. The facts are sufficiently stated in the opinion.

G. R. Fox, for the plaintiff in error.

Mulvany, for the defendant in error.

By Court, WOODWARD, J. A testator and the subscribing witnesses to his will were assembled around the same table at the same time; all signed a will in the presence of each other, but the subscribing witnesses wrote their names before the testator wrote his. The plaintiff in error thinks this was an insufficient attestation, and some observations of Sir H. Jenner Fust, in *In re Byrd*, 8 Curt. 117, *Cooper v. Bockett*, Id. 648, upon the requirements of the English statute, which is more exacting in its terms than ours, are relied on for upsetting this will.

Our statute contemplates, undoubtedly, a signature by the testator, and then a signing by witnesses in attestation of that signature, when witnesses subscribe at all; but where a transaction consists of several parts, all of which occur at the same moment, and in the same presence, are we required to undo it because they did not occur in the orderly succession which the law contemplates? No language of our statute of wills imposes any such necessity upon us, and we would not decide anything so unreasonable, except under stress of very positive statutory language. The execution and attestation of the will were contemporaneous, or rather simultaneous, acts, and we will not regard the question who held the pen first—the testator or his witnesses. The attestation was well proved by the surviving witness, and proof of the signature of the deceased witness raises the presumption that he attested duly: *Harden v. Hays*, 9 Pa. St. 156.

If more discussion of the point be desired, it will be found in the charge, and in the subsequent opinion of the learned judge of the court below.

The judgment is affirmed.

SIGNATURE OF TESTATOR TO HIS WILL must be written before the witnesses sign their names; if written after, the instrument is not duly executed: Note to *Guthrie v. Owen*, 36 Am. Dec. 319.

DECAN v. SHIPPER.

[35 PENNSYLVANIA STATE, 239.]

BILL OF LADING, REGULARLY, FAIRLY, AND FOR VALUE INDORSED TO ANOTHER, will pass the title in the goods to the indorsee.

NO TITLE CAN BE TRANSFERRED BY FRAUDULENT HOLDER of a bill of lading to the property described in the bill by an indorsement of the bill to a purchaser for value, who has no notice of the fraud.

PURCHASER CANNOT CLAIM TO BE INNOCENT, if he takes an assignment of a bill of lading from one who appears, on the face of the bill, to be an agent. That fact is sufficient to put him upon his inquiry as to the true state of the title.

IN error. The facts are stated sufficiently in the opinion.

G. W. Biddle and R. P. Kane, for the plaintiff in error.

G. M. Wharton, for the defendants in error.

By Court, THOMPSON, J. It has been long well settled that a bill of lading, "regularly, fairly, and for value indorsed to another, will pass the title" to the goods to the indorsee: *Schumacher v. Eby*, 24 Pa. St. 521, and the cases there cited.

The question here, however, is not this, but whether a fraudulent consignee or holder of a bill of lading can pass a title to the goods in such bill to a purchaser for value without notice of the fraud; or, in other words, whether he can give title by indorsement, of the instrument, when he has none himself. That is the aspect in which we may certainly consider this case, although there might, perhaps, be another in which the *bona fides* of the indorsee is questionable. The holder of the bill of lading procured the grain from the plaintiffs on the fraudulent representation that he was purchasing it for Alburdis, the indorsee, and that it was to be paid for in cash. Under this false pretense, he procured the delivery to be made, and had it shipped to his own order, and then, by indorsement of the bill, procured an advancement to be made to him by Alburdis. The plaintiffs never sold or parted with their title to him as purchaser, and it was fully shown that he was not authorized to purchase for Alburdis. So that the possession was clearly fraudulent. As soon as the plaintiffs discovered this, and before the vessel sailed, they demanded the redelivery of the grain from the master, and on refusal, brought this action of trover to recover the value. The master defends on the title of Alburdis, under the indorsement of the bill of lading. Can he successfully do so?

We think not. The point thus involved has been elaborately

investigated in recent English cases, and it has been held that by the assignments of a fraudulent holder of delivery orders for goods in store (instruments of the same commercial nature as bills of lading), where the possession of the goods was never intended to be passed by the vendor to such holder, no title passed to a party making advancements on the faith of the assignments, although they were taken in good faith: *Kingsford v. Merry*, 1 Hurlst. & N. 503, in exchequer chamber. So, as to a bill of lading: *Gurney v. Behrend*, 3 El. & Bl. 622. The same principle was ruled in *Brower v. Peabody*, 13 N. Y. 121; and in *Dows v. Perrin*, 16 Id. 325. Such, too, is the elaborate note of the American editors to the case of *Lickbarrow v. Mason*, 1 Smith's Lead. Cas. 751. The reasoning in these cases is so satisfactory that we think the court were right in following them as precedents, and in deciding that the defendant below was not protected by the indorsement of the bill of lading by Bunker to Alburtis.

Indeed, I think, upon the terms of our factor act of 1834, Alburtis could not claim to be a *bona fide* holder; for on the face of the bill, it appears that the grain was delivered to Bunker as agent, and it was indorsed in the same character. Our statute only provides for the passage of the title, if the agent or factor had "authority to sell the same," or "to deposit or pledge it." That he purported to be an agent, and in such capacity shipped the grain and indorsed the bill, is apparent by the bill. This was enough to have put the indorsee on inquiry, at least, as to his right to deal with the grain, and would undoubtedly have led to notice of the true state of the title. If Alburtis chose to run the risk of the title, he must abide the consequences. As we perceive no error in the record, the judgment is affirmed.

McKEAN AND ELK LAND IMP. CO. v. MITCHELL.

[35 PENNSYLVANIA STATE, 269.]

NOTICE IS NOT IMPARTED TO PURCHASER by a memorandum attached to a deed and recorded with it, when the memorandum is so defectively acknowledged as not to be entitled to record.

IN error. Ejectment by defendant in error against plaintiff in error for certain land. The following memorandum was attached to the deed of conveyance, and was entered in the margin of the record-book upon the same page that the deed

was recorded: "Thomas W. Smith having purchased four lots of land of us in McKean county, Penn., as named in the deed dated second of October, 1838, and part of an adjoining lot numbered 2609, sufficient to make in the whole quantity four thousand and fifty acres; now the object of this memorandum is, that the division line through the tract No. 2609 shall be drawn from north to south, and the western portion thereof, to the extent sufficient to embrace the quantity due to T. W. Smith, shall accrue to him, as being adjacent to his other lots. Witness Samuel H. Jones, Benjamin Jones, Andrew M. Jones, Philadelphia, January 1, 1839." Judgment was for defendant in error, and the cause was removed to this court by the plaintiff in error.

L. D. Wetmore, for the plaintiff in error.

B. D. Hamlin, for the defendant in error.

The COURT. The addition made to the deed was not entitled to record, and therefore it was not constructive notice by being in fact recorded.

Judgment affirmed.

REGISTRY IS NOTICE OF TENOR AND EFFECT OF INSTRUMENT recorded only as it appears upon that record. If it, as recorded, lacks a signature, it is no record until the signature is placed upon the record-book: *Shepherd v. Burkhalter*, 58 Am. Dec. 523.

DEED RECORDED IRREGULARLY IS NOT NOTICE: *Shepherd v. Burkhalter*, 58 Am. Dec. 523, note 523. Record is only notice of what appears on its face: *Id.*

BOROUGH OF WEST CHESTER v. APPLE.

[35 PENNSYLVANIA STATE, 284.]

IF ONE WHO IS NOT ORIGINALLY LIABLE BE SUED, he has no right of action against the original wrong-doer, even though the former had notified the latter of the action, and required him to defend, and an award was had against the former which he paid.

MUNICIPAL CORPORATION IS NOT LIABLE FOR DAMAGES resulting from excavations made in its public streets by individuals, under a license from the corporation, for the purpose of introducing water from its main pipes into his private property, or from such individual's neglect to properly fill up the excavation.

In error. Action on the case to recover seventy-five dollars and costs, which one Davis Bishop had recovered from plaintiff, for the wrongful act of defendants in failing to fill up

properly an excavation defendants had made in the public street, by plaintiff's license, by reason of which negligence of defendants said Bishop had sustained an injury. Bishop sued plaintiff (a municipal corporation), and recovered said sum from it. Plaintiff notified defendants of the pendency of the action, and required them to defend it. It also paid said sum upon the judgment in favor of said Bishop, and this action was brought against defendants to reimburse plaintiff. Judgment was for defendants, and plaintiff sued out this writ of error, and assigned the instructions of the lower court to the jury, "that plaintiff could not recover," as error.

W. Darlington, for the plaintiff in error.

W. Butler and P. F. Smith, for the defendants in error.

By Court, LOWRIE, C. J. If the original injury in this case was not legally chargeable against the borough, then it can have no right of action against the original wrong-doer, even though it was sued for it and gave him notice to defend, and an award was had against it, which it paid. One who is improperly sued for the wrong of another must secure himself by a defense against that action, and not by subrogation to another.

Was the borough liable for the original injury? We think not. It is an imperious necessity that has forced upon our towns the substitution of public water-works for the public and private pumps which we used to have, and that has made our streets the place where the public pipes are laid. These pipes thus become public watercourses for the supply of all private needs, and the duty of maintaining them, consistently with private rights, and with the common right of highway in the streets, falls upon the town authorities. But the private right of resorting to them for water makes some interference with the public travel inevitable, and so far the public right must yield. The excavations made for this purpose are for private benefit, done at private expense, and usually without any direct superintendence of the public; and only the persons who make them, or cause them to be made, are answerable for any injury they occasion to the right of travel. The borough had no hand in this excavation, and is not answerable for the carelessness with which it was done. The public fulfills its duty when it furnishes a complete highway, and it is not answerable for the improper modes in which individuals connect their property with it.

Alleys and doors, and steps and drains, are necessary to connect private property with public streets, and branch pipes to connect with gas and water mains; and when the public leaves it to individuals to make such connections, they alone are responsible that the work shall be done without injury to any one. Streets are necessarily used for telegraphic lines, and signs and awnings and hitching-posts, and vaults and vault-gratings, and it is not the public but the individuals who erect such things that are answerable for the injuries arising from them, though the public has power to regulate them, and does attempt to do so. It is enough for the injured person that he has a remedy against the actual wrong-doer. Indeed, it would be most disastrous to make the public liable for all the neglects of individuals in relation to the public streets; for in this way, it would become an insurer against numberless injuries of which it could never learn the origin, and for which it could have recourse to no one. Thus the actual wrong-doer would be left unpunished; whereas, if the search for him be sharpened by private interest, he cannot readily escape.

Judgment affirmed.

N. Y. AND W. PRINTING TEL. CO. v. DRYBURG.

[35 PENNSYLVANIA STATE, 308.]

TELEGRAPH COMPANY MUST SEND VERY MESSAGE PRESCRIBED. They must follow copy; and for a failure to do so, they are liable in damages in an action on the case to the party to whom the message is sent.

MALICE IS NOT GIST OF ACTION against a telegraph company for damages for a failure to send a telegram as it was written.

CORPORATION IS LIABLE FOR CARELESS OR WRONGFUL ACT OF ITS AGENT, if the act be done in the due course of the business of the corporation, though the appointment of the agent be not under seal.

TELEGRAPH COMPANY IS AGENT OF RECEIVER OF MESSAGE transmitted by it, as well as of the person who directed the message to be transmitted.

TELEGRAPH COMPANY IS LIABLE IN DAMAGES TO THIRD PARTIES for the misfeasance of its employees, even though it be considered simply as the agent of the sender of message.

LIABILITY OF TELEGRAPH COMPANY TO RECEIVER OF MESSAGE transmitted by it is not altered by the fact that the party who sent the telegram did not insure it nor have it repeated.

In error. This was an action on the case by P. Dryburg against the New York and Washington Printing Telegraph Company, for "carelessly, erroneously, and untruly transmitting to him a message from Robert Le Roy. Le Roy, a resi-

dent of New York, delivered to said company at that place a message to be sent over their telegraph line by them to Dryburg, a florist in Philadelphia, directing the latter to send him "two hand bouquets." The message as received by Dryburg read "two hundred bouquets." The message was received from Le Roy by the company upon the following terms and conditions: "To provide against mistakes in the transmission of messages, every message of consequence ought to be repeated, by being sent back from the office at which it is to be received to the office from which it is originally sent." "The company will not be liable for any loss or damage that may ensue, by reason of any delay, or mistakes in the transmission or delivery, or from non-delivery of un-repeated messages, but only engage to use reasonable efforts to secure the services of competent and reliable employees, so as to have their business transacted in good faith. . . . Nor will the company be responsible for mistakes in the transmission, nor delay in the transmission or delivery, nor for non-transmission, nor non-delivery of any repeated message to any extent beyond ten dollars, unless it be insured." The message was not insured nor repeated. Defendants alleged that the word "hand" in the original message was written "hund," and proved that the operator who transmitted it was careful and skillful. Judgment for one hundred dollars for plaintiff. Defendants remove the case to this court on a writ of error.

W. S. Price, for the plaintiff in error.

Guillion, for the defendants in error.

By Court, **WOODWARD, J.** The telegraph company did not send Le Roy's message as he wrote it. If written as the company's agent read it, the word "hand" was written "hund;" and if the company had sent the word "hund" to Dryburg they would have been in no fault. Their agent, however, assumed that hundred was meant, and accordingly added the three letters, "red," which did all the mischief. We do not understand that there was any dot after the letters "hund," to indicate a contraction; so that the agent's inference that "hundred" was the word meant was entirely gratuitous.

The wrong, then, of which the plaintiff complains, consisted in sending him a different message from that which they had contracted with Le Roy to send. That it was a wrong, is as certain as that it was their duty to transmit the message for which they were paid. Though telegraph companies are not,

like carriers, insurers for the safe delivery of what is intrusted to them. their obligations, as far as they reach, spring from the same sources—the public nature of their employment, and the contract under which the particular duty is assumed. One of the plainest of their obligations is to transmit the very message prescribed. To follow copy, an imperative law of the printing-office, is equally applicable to the telegraph office.

But when they violate this duty, whether negligently or willfully, are they responsible to the party to whom the erroneous message is addressed? That is the exact question upon this record. That the defendants would be responsible to Le Roy, and that he would be responsible over to Dryburg, are not contested, though perhaps not conceded, points; but that the company are liable to Dryburg is resisted on several grounds.

In the first place, it is said that the case belongs to that class of torts in which malice is the gist of the action. This is a mistake. The *narr.* lays the duty to transmit the message as it was received, and assigns, as the breach, that it was transmitted “erroneously, untruly, and carelessly.” No malicious intent is alleged, nor was it necessary that one should be alleged or proved. It is enough that negligence is charged and proved. It is settled, upon abundant authority, that incorporated companies may be sued in their corporate character, for damages arising from neglect of duty, and for trover: 1 Ch. Pl. 68; *Chestnut H. & S. H. Turnpike Co. v. Rutter*, 4 Serg. & R. 6 [8 Am. Dec. 675]; *Fowle v. Common Council of Alexandria*, 3 Pet. 409; *Bushel v. Commonwealth Insurance Co.*, 15 Serg. & R. 173. And a corporation is liable in tort for the tortious act of its agent, though the appointment of the agent be not under seal, if the act be done in the ordinary service: *Smith v. Birmingham Gas Light Co.*, 1 Ad. & El. 526.

Apart, however, from corporation law, it is said, in the next place, that, upon the general principles of agency, the company can be held answerable to Le Roy only. That the relation of principal and agent existed between him and the company, there can be no doubt; but I do not think it equally clear that that relation was not established between Dryburg and the company. Telegraph companies are, in some sort, public institutions—open alike to all; and are largely used in conducting the commerce of the country. The banks decline to act upon their authority, and doubtless, individuals may also decline; but when a man receives a message at the hands of

the agent of such a company, and does act upon it, especially if, as Dryburg did, he use the same medium for responding to the message, it seems reasonable that, for all purposes of liability, the telegraph company shall be considered as much the agent of him who receives, as of him who sends, the message. In point of fact, the fee is often paid on delivery; and I am inclined to think the company ought to be regarded as the common agent of the parties at either end of the wire.

But, however this may be, regarding the company as alone the agent of the sender of the message, is it to be doubted that an agent is liable for misfeasance, even to third parties? For nonfeasance, I agree, the agent is responsible only to his employer, because there is no privity of consideration betwixt the agent and a third party. The remedy in such cases must be sought in the maxim *respondeat superior*; but even to this rule, there is an exception in the instance of masters of ships, who, although they are the agents or servants of the owners, are also, in many respects, deemed to be responsible as principals to third persons, not only for their own negligences and non-feasances, but for those of subordinate officers and others employed under them. The general rule, however, was laid down by Lord Holt in *Lane v. Sir Robert Cotton*, 12 Mod. 488, in these words: "A servant, or deputy, as such, cannot be charged for neglect, but the principal only shall be charged for it; but for a misfeasance, an action will lie against a servant or deputy, but not as a deputy or servant, but as a wrong-doer." S. C., 1 Ld. Raym. 646. The compilers have taken the rule from this source, and the cases cited by them show that it has generally been followed: See Paley on Agency, 396 et seq.; and Story on Agency, secs. 308, 309, 314, 315, and the cases in notes.

The case of *Camp v. Western Union Telegraph Co.*, 1 Metc. (Ky.) 164, does not affect this principle, as we apply it here, for there the action was by the sender of the message, and it appeared that the message was sent subject to the express condition that defendant would not be liable for mistakes arising from any cause, unless the message was repeated by being sent back. This company had such a rule also; but they charge fifty per cent advance upon the usual price of transmission, where the sender demands that the message be repeated back to the first operator. and Le Roy did not pay it. If it be granted that, in consequence of his not purchasing this security against mistakes, he could not hold the company liable, it does not follow that Dryburg cannot. He did not

know whether the message had been repeated back to Le Roy or not. He received it as the company delivered it to him, and it is very material to observe that the mistake was not due to what has been called the infirmities of telegraphing, but to the improper liberties which the operator took with the text before him. The magic power which presides over the wires performed its duty faithfully, and bore the very message it was bidden to bear, but the human agent sent a different message from that which he was commanded to send. This is the misfeasance the plaintiff complains of.

The company claimed that their operator was a skillful and careful one. Then his negligence in this instance was the more apparent and inexcusable. If the handwriting was so bad that he could not read it correctly, he should not have undertaken to transmit it; but the business of transmission assumed, it was very plainly his duty to send what was written. It was no affair of his, that the message would have been insensible. Messages are often sent along the wires that are unintelligible to the operator. When he presumed to translate the handwriting, and to add letters which confessedly were not in it, he made the company responsible to Dryburg for the damages that resulted from his wrong-doing.

We do not conceive it necessary to go any further in the discussion of this case. There are several errors assigned to which we have not specifically alluded, but we see nothing in them to require a reversal of the judgment.

Judgment affirmed.

CARR v. NORTHERN LIBERTIES.

[35 PENNSYLVANIA STATE, 324.]

FAILURE TO EXERCISE POWER vested in a municipal corporation by a statute does not render such corporation liable for damages occasioned by such failure.

RIGHT TO ERECT SEWERS and other drainage works given to a municipal corporation does not impose a duty to erect them.

RIGHT IN CITIZEN TO PERFORMANCE OF ACT IMPOSES DUTY upon the officer who is authorized to perform it, but where the right depends upon the grant of an authority, and that authority is discretionary, no legal duty is imposed.

EXPERT TESTIMONY IS OF NO WEIGHT when the witnesses, whose opinions are taken, have no learning in the scientific principles of which they speak.

CERTIFICATE from the court of *nisi prius*. The facts are sufficiently stated in the opinion.

Rawle, for the plaintiff in error.

King, for the defendant in error.

By Court, LOWRIE, C. J. The plaintiff had his house flooded by the water which fell in one of those heavy showers which occur during the summer every few years, and he complains that his loss is chargeable to the faults of the municipal authorities, and that he is entitled to compensation from the corporation. On the trial, he was nonsuited, on the ground that he had shown no such fault in the corporation officers as entitled him to the compensation sued for. Was there such evidence?

Much of the testimony relied on consists of the mere opinion of witnesses who are evidently unlearned in the scientific principles of which they speak; who can have no pretensions to be experts; and whose opinions, therefore, are in some instances plainly unfounded, and in all instances unworthy of credit, because we have no evidence that they had any such experience or education as would entitle us to rely on them. For instance, when witnesses suppose that an acute angle in the culvert tended to obstruct the flow of water in the part below the angle; that the water in Cohocksink creek was backed up the culvert, and through the inlets into Fifth street, without flooding the streets from the creek up to Fourth street, and above it; that a wing-wall (tending to form an eddy at the mouth of the culvert, and turn off the stream of the creek) would have prevented the backing up of the creek; that for want of air-holes the flow of water in the culvert was obstructed by air;—all this, and more that might be mentioned, is mere matter of opinion, and is entitled to no weight at all with a court and jury, unless it comes from persons who first give satisfactory evidence that they are possessed of such experience, skill, or science in such matters as entitles their opinions to pass for scientific truth. All the testimony of this character must, therefore, go for nothing.

One witness gives us his calculation that rain, falling at the rate of an inch an hour, on the territory drained through this sewer, would require a head of three feet, and an outlet of six feet diameter for its discharge; but neither he nor any one else tells us how much rain would fall per hour in such a shower, nor how much head there is between the pavement at the

plaintiff's corner and the mouth of the sewer, either at high or at low water in the creek, nor what was the state of the creek; and therefore, even if we could rely on his calculation, he does not furnish us with sufficient facts for working out any conclusion. There is no adequate evidence, even including the mud at the outlet, that the culvert was deficient in capacity.

The mud in the mouth of the culvert does not seem to us to be any evidence of obstruction there, but rather that there was some obstruction outside in Cohocksink creek, or some inadequacy of descent there, and we do not see how the corporation can be chargeable for that.

For the part, therefore, which the corporation had in this disaster, we are reduced simply to this: that the inlets along this culvert were not of sufficient capacity for the prompt discharge of such a shower as the one in question. Is the corporation therefore liable for the damage caused by the shower?

On the trial at *nisi prius*, I expressed the opinion that if before the culvert was made there was an adequate overground drainage for the protection of the plaintiff's property against such showers as this, and the corporation changed it by substituting for it a culvert that was inadequate, and by reason thereof the plaintiff was injured, he was entitled to recover. But we need not go so far now; for there is no evidence that any such injurious change was made, and therefore we give no opinion about it.

The question, then, is really reduced to this: Have the citizens of our incorporated towns a legal right to call upon the portion of the people thus incorporated, to devise and execute such a system of drainage as will secure all private property against all ordinary and extraordinary flooding by rain or melting snow? A little reflection makes it very easy to answer this question in the negative. No such right or duty exists in mere townships, and the mere fact of incorporation does not change the rights of the citizen as against the public, but only the form of public organization. A very large portion of all such drainage is by means of mere gutters, and most of our towns have nothing else; and yet everywhere this means is inadequate for protecting cellars, in some localities, against the flooding which long and heavy rains and the sudden melting of deep snow occasion. To make gutters that would protect against these would often require that whole streets should be converted into gutters, and thus made,

in a measure, impassable as streets. Lots on low ground, and cellars and low floors, are naturally subject to be flooded, and to save them from all risk of this would require drainage regulations that could not be endured. Rivers, creeks, and rivulets are natural drains, often running through towns, and if all riparians are to be secured against their floods, they must be excluded from all convenient use of them at their ordinary stages. Gutters in large towns must be very frequently overflowed in every year, because of their inadequacy for a long reach of drainage, and sewers are almost essential for their relief; yet no law requires their construction in any given case. And if people who chose to build houses and cellars in places where they are exposed to floods are entitled to damages for being flooded, then, of course, people having gardens, coal-yards, lumber-yards, or even vacant lots, must also be protected; for the difference is only in degree of value; and then we are without any measure relative to the amount of litigation which the principle would sanction, and relative to the amount of work and skill and care that would be imposed on our town authorities.

Here it becomes manifest how careful we must be that courts and juries do not encroach upon the functions committed to other public officers. It belongs to the province of town councils to direct the drainage of our towns, according to the best of their means and discretion, and we cannot, directly or indirectly, control them in either. No law allows us to substitute the judgment of a jury, it may be a jury from the country, for that of the representatives of the town itself, to whom the business is especially committed by law. Juries are not often called upon to think of these distinctions, and therefore they are prone to think that when an evil has been suffered they have a right to correct it, if the case comes before them, without stopping to inquire how far they may be guilty of a usurpation of authority in doing so.

Yet there must be many evils, and even many wrongs, for which there can be no remedy. Government is a people's means of doing the best they can to secure harmony among conflicting interests, and to facilitate the free action of legitimate pursuits. They choose governors, and legislators, and judges, and councilmen, and other officers, to carry on their government, and though they make as good selections as they know how to do, yet their officers are sure to make mistakes, and sometimes to cause great damage to individuals; yet the

people cannot be made answerable for this before the courts, except only in some special cases. They must suffer for their mistakes in choosing incompetent officers; but this is only a moral responsibility, to which all that is human must submit.

Municipal corporations have often been held liable for carelessness in the exercise of their functions; but if we undertake to correct the evil in such a case as this, on the ground of carelessness, we see not how to escape from the necessity of submitting the propriety of all acts of grading and draining in our towns to the decision of juries; for even discretionary acts may be charged to have been ignorantly or carelessly resolved upon. Any street may be complained of as being too steep or too level; gutters, as being too deep or too shallow, or as being pitched in a wrong direction; and there may be evidence that these things were carelessly resolved upon, and then a tribunal that is foreign to the municipal system will be allowed to intervene and control the town officers. And the end is not yet; for if a regulation be altered to suit the views of one jury, the alteration may give rise to another case, in which the new regulation will be likewise condemned. This theory is so vicious that it cannot possibly be admitted.

The evidence shows that when the culvert and its inlets were constructed they were entirely adequate. But in the course of time, the adjoining corporation of Spring Garden became more densely built up, and a larger body of water was thrown into the gutters discharged through these inlets, and then experience began to reveal the fact that, on very special occasions, the inlets were insufficient; but still the culvert and its inlets were better for the plaintiff's property than the gutters alone would have been, and he was, therefore, not injured by them, and could have had no right of action unless the corporation was legally bound to provide adequate sewers. The corporation was no doubt tardy in providing the additional inlets; but even individuals, and much more, large social bodies, are always slow in learning wisdom from experience, and in changing their regulations to suit a change of circumstances; and such things must be borne.

We do not admit that the grant of authority to the corporation to construct sewers amounts to an imposition of a duty to do it. Where any person has a right to demand the exercise of a public function, and there is an officer or set of officers authorized to exercise that function, there the right and the

authority give rise to the duty; but when the right depends upon the grant of authority, and that authority is essentially discretionary, no legal duty is imposed. We cannot treat it as imposed here, without assuming an improper control of municipal affairs. The courts cannot redress all evils. By exceeding their proper functions, they may at last do nothing well.

Judgment affirmed.

READ, J., having been of counsel in the cause, did not sit.

MUNICIPALITY IS NOT LIABLE FOR DAMAGES RESULTING FROM LAWFUL EXERCISE OF ITS DISCRETIONARY POWER to plan and construct public improvements: *Fair v. Philadelphia*, 88 Pa. St. 311, citing the principal case.

WHERE DUTY IS ENJOINED, RULE IS OTHERWISE: *Grant v. Erie*, 69 Pa. St. 422; *Allentown v. Kramer*, 73 Id. 409, both citing the principal case. A failure to exercise a power does not create a liability against such municipality: *Id.*; also *Patch v. Covington*, 66 Am. Dec. 186, and note 192.

LEIPER'S APPEAL.

[35 PENNSYLVANIA STATE, 420.]

SALE OF REAL ESTATE ON CREDIT WORKS EQUITABLE CONVERSION THEREOF into personalty for the purposes of succession. If it is recovered back by the widow and heirs of the owner after his death, under a clause of forfeiture in the contract of sale, its status is not changed, and it is to be distributed to the heirs of the deceased owner as personal property, and in the proportion that personalty would be distributed to them.

APPEAL from the orphans' court by Thomas J. Leiper in his own right as guardian of three of the minor children of Samuel M. Leiper, deceased. In his life-time, Samuel M. Leiper owned an undivided interest in one hundred and twenty thousand acres of land, the legal title to which was vested in Dr. W. A. Irvine, in trust for the equitable owners. With the consent of all interested, Dr. Irvine sold this land, the purchase-price to be paid in installments. S. M. Leiper died before the first installment became due, leaving a widow and five children. He made a will appointing his widow his executrix. The widow declined to take under the will, and elected to take her share of the estate under the intestate laws. The first installment became due and was not paid. The time for its payment was extended, with the consent of the widow, and an agreement made that if not paid then the land was to revert to the owners. Payment was not made, and thereupon the trustee

rescinded the contract, and the land reverted to the owners. The court distributed the said real property to the widow and heirs of said deceased as personal property, and the above-named appellant appeals from said judgment.

H. G. Jones and H. G. Clay, for the appellant.

J. A. Clay, for the appellee.

By Court, THOMPSON, J. The sale of the land out of which this controversy has arisen, by Irvine, the trustee, with the assent of Leiper, the *cestui que trust*, undoubtedly brought the land within the rule in equity which requires it to be treated as personal estate for the purpose of regulating the succession to it. That it was such a conversion, so far as the widow and heirs were concerned, is clearly ruled in *Rangler's Appeal*, 3 Pa. St. 377; *Foster v. Harris*, 10 Id. 457; *Rose v. Jessup*, 19 Id. 281; *Longwell v. Bentley*, 23 Id. 99; *Leiper v. Irvine*, 26 Id. 54.

After the death of the decedent, the purchase-money fell due, and had it been collected, no one will doubt but that the widow would have been entitled to her third of it, she having elected to take under the intestate laws, and not under the will of her husband. It was not collected, however, but by arrangement between the trustee and vendees, with the assent of Mrs. Leiper, the time for payment was extended, with a stipulation that if not paid at the expiration thereof, the contract was to be forfeited, and the land to revert to the owners. There was a failure of payment, and the consequence was a rescission of the contract. Was this a reconversion, so as to change the rights of the widow and heirs? The auditor and court below thought not, and in this they are fully sustained by the cases cited. In *Rose v. Jessup*, *supra*, the very point arose and was ruled, Lowrie, J., saying that the testator having "sold real estate by valid agreements, the sums due thereon were part of his personal estate, and on his death his widow's interest therein became immediately vested. . . . It was the duty of the trustees to proceed on the agreement, and collect the money for those having a right to claim it. If such pursuit should result in recovering back the land, they were bound to account for that, as a substitute for the money, and subject to the same trusts." In substance, the same thing was said in *Leiper v. Irvine*, 26 Pa. St. 54.

There is no room for the distinction, I apprehend, between a recovery back of the land in pursuit of the money, and taking it back as the result of the forfeiture of the contract for non-

payment of the purchase-money at the time fixed. Strictly speaking, this provision was a remedy to enforce payment of the purchase-money, and was, in substance, an agreement to yield up the land in satisfaction of the contract, in lieu of the money, if that was not forthcoming. In the case last cited, Lewis, C. J., said: "If they [the widow and heirs] had a right to the proceeds" of the contract for the sale of the lands, which he had immediately before asserted, "they had, of course, a right to take the land in lieu of the money, with the assent of the vendees." This is so directly in point that we need not further discuss this branch of the case.

Nor is there anything whatever in the case, as has been suggested, which raises any implication, other than that the land was taken in lieu of the purchase-money. This being so, the right of the widow in it is just what it would have been if money and not land had been received. On the resale, she was therefore entitled to the one third of the purchase-money, and consequently to the one third of the proceeds of the certificates of stock of the McKean Land and Improvement Company. These views cover all the assignments of error, and in none of them do we find anything to correct.

Decree of the orphans' court affirmed.

NORTH AMERICA BUILDING ASSOCIATION v. SUTTON.

[35 PENNSYLVANIA STATE, 423.]

RECEIPTS BIND CORPORATION WHEN THEY ARE GIVEN BY ITS OFFICERS for money received by them for the corporation from a member in the ordinary course of the business of the corporation, and especially so when they are contained in a book furnished for that purpose. The fact that it contains receipts for various classes of payments, such as dues, fines, interest, etc., does not alter the rule.

MEASURE OF DAMAGES IN ACTION AGAINST BUILDING ASSOCIATION for wrongfully refusing to permit the transfer on its book of certain shares of its stock is the sum paid on said stock as dues and interest thereon from the time of the several payments.

INSTALLMENTS PAID ON STOCK BY MEMBER OF BUILDING ASSOCIATION are not payments upon a mortgage due from the member to the association, although for some purposes they have been treated as such by the courts.

INSTALLMENTS PAID ON STOCK TO BUILDING ASSOCIATION by one of its members after the trial of an action of the association against such member, and after judgment had therein, works an estoppel against such association, and it cannot afterwards claim that said stock was treated in said case as so much money paid on the member's loan to the association.

In error. The facts are sufficiently stated in the opinion.

S. T. Van Sant, for the plaintiff in error.

Briggs, for the defendant in error.

By Court, STRONG, J. This was an action against the building association to recover damages for refusing to permit the plaintiff to transfer seventeen shares of stock held by him therein. On the trial, a verdict and judgment were obtained against the defendants. It is now assigned for error that the court below permitted to be given in evidence certain receipts of the officers of the association to the plaintiff for money paid by him to them. The objection is that the receipts were not proved by the person who signed them. They were, however, official receipts in the book of the corporation furnished by it to the plaintiff, and proved by its secretary. Even if we admit that they were but declarations of the officer who signed them, yet they were made in the discharge of his duty as an officer, and therefore were admissible against the association, whose agent the officer was. On the trial of the issue between the plaintiff and the association, the testimony of the person who signed them would have been no better evidence than was that of the secretary, whose testimony was admitted. The fallacy of the argument of the defendants below is in the assumption that the testimony of the secretary was secondary. It was no more secondary than would have been that of Springer himself.

Nor were the receipts inadmissible because they embraced sums paid for fines, and interest upon the debt due, as well as for installments upon the stock. Evidence of what had been paid upon the stock was important to show its value. The introduction of proof of other payments was a necessity caused by the defendants themselves. They could not have been injured by it, for it was in their power to show how much was paid for fines, and how much for interest. There is nothing, therefore, in the first assignment of error.

Equally unfounded is the second. The jury were instructed to find a verdict for the plaintiff for the amount which Samuel Sutton had paid the defendant, on seventeen shares of stock, as dues, and the interest on the same from the time of their several payments. The objection to this is, not that there had been no refusal to permit the transfer, but that there was evidence that only ten shares had been assigned to the corporation. If the fact were so, what difference would it make in

the plaintiff's right? That he subscribed for and had been the holder of seventeen shares, that he had transferred either all of them, or at least ten, to the association as collateral security for the payment of his bond and mortgage to them, and that all which was legally recoverable upon the bond and mortgage had been paid, were undisputed facts in the case. It is probable that all were held by the association as collateral. The loan was on the security of all, and the rules required all to be transferred. The witness only knew that ten had been. His knowledge was negative. The fair presumption was that the defendant held all. But if it were not so, the plaintiff offered to transfer the entire seventeen. The defendants refused to permit it, and their refusal was based, not upon the ground that they held only ten, or that he did not own seventeen, but because he had not paid the premium upon the loan made to him. They insisted that, after having paid all which was legally due upon his debt, after having satisfied the judgment obtained upon his mortgage (as collateral security for which they held the shares), he should pay something more, which he was not in law bound to pay. That was a demand which they had no right to make, and it was no justification for a refusal to permit a transfer, whether the shares stood in their name, or in the name of the plaintiff. We need hardly say that there was no evidence that the ownership of the seventeen shares, originally subscribed by Sutton, did not still remain in him. The attempted transfer to his son was never consummated, nor was that to Lewis S. Coryell. It was not on account of either of these that the refusal of the defendants was made.

The remaining assignment of error raises the only important question in the cause. Upon the mortgage which the plaintiff had given to secure the payment of the money borrowed by him from the association, a *scire facias* was issued to December term, 1856. A plea of payment with leave was put in, and a verdict and judgment were rendered in favor of the mortgagees for two thousand three hundred and ninety dollars and forty-two and three fourths cents. The verdict was obtained on the twenty-sixth of May, 1857, and the judgment was signed on the twenty-third of September in the same year. It is now contended that this record establishes conclusively that Sutton, the plaintiff, recovered and was allowed, under his plea of payment to the *scire facias*, the full value of his stock; that he then had credit for all the installments which he had paid; that they were applied in satisfaction of the

mortgage, and that consequently he is estopped from a recovery in the present case. This position is rested upon what was said in *Kupfert v. Guttentburg Building Association*, 30 Pa. St. 465, and *Hughes's Appeal*, Id. 471. In those cases, which were questions of distribution after a sheriff's sale of the property mortgaged, it was held that payments on account of the stock were to be regarded as payments on account of the loan. If this be so, it is argued, and with great force, that after the judgment upon the *scire facias*, it must be taken as settled that the plaintiff has already had a credit upon his mortgage for the value of the stock, so far as it was made up by payments of installments. The doctrine of those cases was perhaps in advance of the general understanding. It was considered to be necessary, in order to protect the borrowing community from the oppression and hardships to which they are so often subjected by the money-lending associations now so numerous, and so unlike in character to what was supposed when the legislature provided for their incorporation. It is well known that the original design of the legislature was to encourage the erection of buildings. The motive for the grant of the franchise was public improvement. But the practical working of the associations formed under the law has not been what was anticipated. Though called "building societies," they are, in truth, only agencies by which a greater than legal interest is obtained from the necessitous and unwary. It was the knowledge of this fact which led to the effort made in the cases cited to afford some protection to the borrower. What was then said, however, is not to be regarded as laying down the rule that payment of dues on the stock, *ipso facto*, works an extinguishment of so much of the mortgage. The debtor may so apply it, but the payment itself is not an application of the money to the reduction of the mortgage. To hold that it is, would be giving to the associations additional facilities for obtaining excessive interest. The debtor is not compelled to give up his stock whenever suit may be brought upon his bond or mortgage. Such would, however, be the necessity of his case, if the law applied, against his consent, the installments paid by him upon his stock to the discharge of his indebtedness for the money borrowed.

In the case in hand, it is plain that the plaintiff did not so apply the stock payments which he had made. No credit for them was allowed to him on the trial of the *scire facias*. It may be, it was not then supposed he could claim or receive credit. The cases in 30 Pennsylvania State had not been decided. Cer-

tain it is, that the payments were not then thus applied, for after the verdict was obtained, both parties treated the stock as subsisting. The verdict was rendered on the twenty-sixth of May, 1857; yet on the sixth of July afterwards, Sutton paid, and the defendants received, five hundred and seventy dollars and twenty-two cents on account of back dues and fines on the seventeen shares of stock. Again, on the fifth of April, 1858, Sutton paid two hundred and four dollars and twenty-four cents on the same account; on the third of May, 1858, Mr. Kennedy, the equitable plaintiff, paid for Sutton seventeen dollars, one month's dues, payable on that date; and once more, June 7, 1858, Mr. Kennedy paid another month's dues. This all took place after the rendition of the verdict, and most of it after the entry of the judgment. The receipts show that the dues were all paid up to June, 1858, until long after the plaintiff offered to make the transfer, and the defendants refused to permit it. How, then, can they now say that any portion of the stock has been extinguished? How can they aver that the payments were applied in satisfaction of the mortgage? Long after the judgment on the *scire facias*, and long after the payment of the judgment, they treated the stock as valid and existing, received numerous payments upon it, and acknowledged that all installments upon it which were due had been paid up to about the time when this suit was brought. What honest pretense had they to receive payments of installments in 1857 and 1858, if the stock was then not in existence? And how can they justly contend that any of the payments were on the mortgage, and not on the stock, in the face of their receipts of May 7 and June 3, 1858? Even if the installments paid before the verdict in the *scire facias* must be considered as having been made on the mortgage, the defendants are in turn estopped from denying that the stock exists, and that all dues upon it were satisfied until after the demand and refusal to transfer.

There was no error, therefore, in entering judgment for the plaintiff upon the reserved point. This disposes of all the assignments of error, and leads to the affirmance of the judgment.

Judgment affirmed.

PAYMENTS OF DIVIDENDS ON BUILDING ASSOCIATION STOCK is not *ipso facto* a payment upon a mortgage due from the owner of the stock to the association: *Economy B. Ass'n v. Hungerbuchler*, 93 Pa. St. 263; *Early and Lane's Appeal*, 89 Id. 414; *Sp. Car. Ass'n v. Tradesmen's L. Ass'n*, 46 Id. 495, citing the principal case.

WATERS'S APPEAL.

[25 PENNSYLVANIA STATE, 522.]

JUDGMENT AGAINST EQUITABLE ESTATE OF VENDEE in the land purchased attaches to the legal estate therein as soon as it vests in such vendee.

VENDOR IS ESTOPPED AS AGAINST SUBSEQUENT CREDITORS, where he takes from the vendee a confession of judgment for the balance of the purchase-money of land sold to the latter, and subsequently conveys the legal title to the vendee, by a deed containing a statement that the consideration is paid, and releasing to the vendee all the vendor's "estate, right, title, interest, claim, and demand whatsoever, in law or equity," in and to the land, concluding with a clause of general warranty. These circumstances do not work an estoppel by deed, but do amount to an estoppel *in pais*, and such vendor cannot claim as against those who have credited his grantee upon the faith of the deed.

ESTOPPELS ARE SUSTAINED TO EXCLUDE TRUTH because a man's own acts closeth up his mouth to allege the truth. No man should allege anything in his defense but the truth, and what he once alleges he ought not afterwards to dispute.

APPEAL from the common pleas. The facts are sufficiently stated in the opinion.

Elwell and Adams, for the appellant.

Mercur, for the appellees.

By Court, **WOODWARD, J.** It has been many times said and decided in Pennsylvania, that a judgment against the equitable estate which a vendee holds under articles of agreement for the sale and purchase of land attaches to and binds the legal estate the instant that it vests in the vendee: *Richter v. Selin*, 8 Serg. & R. 425; *Lynch v. Dearth*, 2 Penr. & W. 110; *Episcopal Academy v. Frieze*, 2 Watts, 16; *Foster's Appeal*, 3 Pa. St. 80; *Lyon v. McGuffey*, 4 Id. 126.

In all such cases, effect is given to the judgment lien, without revival, against a subsequently acquired interest of the debtor, and it cannot be disguised that, in so far, the principle that was settled for us, after great deliberation, in *Colhoun v. Snider*, 6 Binn. 135, that judgments shall not bind subsequently acquired real estate, has been qualified, perhaps contravened.

Notwithstanding the dissatisfaction that has been expressed with the doctrine of *Colhoun v. Snider*, *supra*, by several judges, it has been followed in a multitude of cases, and is too firmly rooted in our law to be shaken at this day. The judgment against an equitable vendee must be regarded as an exception, therefore, from the general principle that limits judgment

liens to such estate as the debtor held at the date of their entry.

But now, it is said, the exception is to be received with a distinction between vendors and other judgment creditors. If A agrees to sell land to B, places him in possession, and takes a judgment for part or all of the purchase-money, and then conveys the legal title without taking any new security, his remedy is gone; but if strangers obtain judgments against B, after the date of the articles, and before the deed, they are not only a lien upon his existing equitable estate, which is measured by the purchase-money already paid, but they open to take in the additional equities created by future payments, and the whole legal estate also when B gets his conveyance of that. The only ground upon which a distinction so unfavorable to vendors can be supported is, that by his deed he has released and given up all his interest in and claim upon the land. Deeds of conveyance are sometimes, though not generally, expressed to be made subject to the payment of an ascertained sum of consideration money; and where that condition is not expressed, the general terms used by conveyancers do import a surrender of all prior rights. The deed of Waters to Spencer, in this case, contained no condition for the payment of purchase-money, and was in the usual full terms of conveying. It acknowledges the receipt in full of the purchase-money; it conveys and releases all the grantor's "estate, right, title, interest, claim, and demand whatsoever, in law and equity;" and it concludes with a covenant of general warranty. It was made two days after Waters entered his judgment against Spencer; was recorded four days after it was made, but was recorded more than a month before any of the other judgment creditors of Spencer got upon the record. The material dates are as follow:

July 1, 1858. Articles of agreement, Waters to Spencer.

July 3, 1858. Judgment, *Waters v. Spencer*, for six hundred and forty-nine dollars and fifty-five cents, balance of purchase-money.

July 5, 1858. Deed, Waters to Spencer, such as above described.

July 9, 1858. The deed was recorded.

August 26, 1858. Judgment of *Mace v. Spencer*.

September 1, 1859. Sheriff's sale of the land on Mace's judgment.

After the entry of Mace's judgment, and before the sheriff's

sale, various creditors of Spencer obtained judgments, who together with Mace claim the proceeds of the sheriff's sale, to the exclusion of Waters, the vendor.

Now, how is Waters to be excluded? Not on the ground that his judgment was entered against only the equitable estate of Spencer, for, as we have seen, judgments so entered do attach to the legal estate as soon as it unites with the equitable, and a vendor's judgment is as much within the rule as the judgment of a third party. Vendors are usually regarded as the most meritorious creditors; and it would be refining against reason to so apply the rule as to protect other creditors, and cut out vendors. In this case, it is true, the judgments of the general creditors were not entered against the equitable estate; but had they been, they would have become liens on the legal estate the instant it was conveyed to Spencer, and the same elastic quality which the law would have recognized in the judgments of such creditors belongs to the judgment of Waters.

If, therefore, he is to be deprived of the benefits of his priority, it must be not in character merely of vendor.

Does his deed estop him? Estoppels may be by deed, but estoppels by deed avail only in favor of parties and privies. Now, the judgment creditors who seek to postpone Waters are not privies of Spencer, either in blood, in law, or by estate: not in blood, for no relationship is alleged; nor in law, for the legal relation between debtor and creditor is one of antagonism rather than of confidence or of mutual dependence; nor by estate, for they have none in the debtor's land. What proves that they have no interest in the land is, that a judgment against one of these judgment creditors would not be even a lien on this land.

The truth is, the relation of judgment creditors to their debtor's real estate is anomalous. They have a lien upon it by virtue of statute law, but they have no interest in it such as makes them privies in estate with their debtor. The covenants, then, express or implied, of Waters's deed, cannot operate in favor of Spencer's creditors as an estoppel by deed, and we do not understand any such effect to have been intended by what was said of the deed in *Altman v. Klingensmith*, 6 Watts, 448. That case was very peculiar, and it is not quite clear whether the court meant to rest their judgment on the doctrine that the costs of a judgment are not a lien after the debt and interest are paid, or on the position that the officers to whom the costs were payable might not use the plaintiff's

name to enforce payment out of the land, because of the general terms of release he had employed in conveying the legal title.

But though there can be here no estoppel as by deed, is there not an estoppel by matter *in pais*? This class of estoppels has been very much extended of late years, and the result of the authorities in respect to it is nowhere better expressed than by Lord Denman, in *Picard v. Sears*, 6 Ad. & El. 475. "The rule of law is clear," said his lordship, in delivering the opinion of the court in that case, "that where one, by his words or conduct, willfully causes another to believe in the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time." In *Freeman v. Cooke*, 2 Exch. 661, Baron Parke approves of the principle as thus defined, cites numerous cases in support of it, and tells us that by the term "willfully," as used by Lord Denman, we are to understand, if not that the party represents as true what he knows to be untrue, at least that he means his representation to be acted upon, and that it is acted upon accordingly.

Now, if we apply this rule to the facts of the case before us, it would seem to be decisive against Waters. His declaration was very solemn, precise, and full, that he had no claim on this land, and it was spread upon a public record. It is not an unreasonable presumption that the judgment creditors acted upon it. What time they gave credit to Spencer has not been shown; but when they entered up their judgments, they could have understood nothing else from his possession under such a deed as he held than that he had paid the vendor in full. But for this, some other security might have been obtained; but for this, the credit, perchance, had never been given. Waters may not have intended to mislead the creditors, but, on the principle that every man is responsible for the legal consequences of his acts, he must be presumed to have intended that the creditors should deal with Spencer as if his land were unincumbered; and the necessary presumption from the record is that they did so deal. The secret agreement between Waters and Spencer, that the judgment of the third of July should stand as a continuing security for the unpaid purchase-money, cannot affect the creditors, for they had no notice of it; but had notice of solemn declarations of exactly a contrary effect. As between themselves, Waters and Spencer, that agreement would be enforced. As between either of them and a third

party, the very truth would be according to that agreement; but that is the truth which the appellant has estopped himself from showing. Estoppels are sustained to exclude the truth. "It is called an estoppel or conclusion," says Lord Coke, "because a man's own act or acceptance stoppeth or closeth up his mouth to allege the truth." Hargrave's note on this reads: "No man ought to allege anything but the truth for his defense, and what he has alleged once is to be presumed to be true, and therefore he ought not to contradict it; for, as 't is said in the 4th Inst. 272, *Allegans contraria non est audiendus*:" 8 Co. Lit. 342.

This used to be considered harsh law, and it grew into a proverb that estoppels were odious; but the observations of Mr. Smith, in concluding his note on the *Duchess of Kingston's Case*, strike us as just, and they shall conclude this opinion.

"The truth is," says that excellent writer, "that the courts have been for some time favorable to the utility of the doctrine of estoppel, but hostile to its technicality. Perceiving how essential it is to the quiet and easy transaction of business, that one man should be able to put faith in the conduct and representations of his fellow, they have inclined to hold such conduct and such representations binding in cases where a mischief or injustice would be caused by treating their effect as revocable. At the same time, they have been unwilling to allow men to be entrapped by formal statements and admissions, which were, perhaps, looked upon as unimportant when made, and by which no man ever was deceived, or induced to alter his position. Such estoppels are still odious."

The decree is affirmed.

JUDGMENT AGAINST EQUITABLE ESTATE which a vendee has in land, under a contract to purchase it, attaches to and binds the legal title the instant it vests in the vendee: *Zeigler's Appeal*, 69 Pa. St. 473, citing the principal cases; *Oake's Appeal*, 62 Am. Dec. 328.

SCHENLEY ET UX. v. COMMONWEALTH FOR USE OF THE CITY OF ALLEGHENY.

[36 PENNSYLVANIA STATE, 29.]

OBJECTION TO MODE OF BRINGING CASE BEFORE COMPETENT COURT must be made before a general appearance and plea in bar.

COURT HAVING EXCLUSIVE JURISDICTION OVER MUNICIPAL CLAIM MAY ISSUE WRIT OF SCIRE FACIAS, notwithstanding the claim has been filed in another court, and not yet removed to the court having jurisdiction.

STATEMENT OF MUNICIPAL CLAIM FOR PAVING AND GRADING STREET need not set out the nature, quality, and amount of work done, with the dates and prices thereof, under the act of March 30, 1852.

MUNICIPAL CLAIM MAY BE FILED WHEN.—Municipal claim for grading and paving street, and made against owner of adjoining land, may be filed any time after demand; and remains a lien on the land until paid, under the acts of April 5, 1849, and April 8, 1851.

ORDINANCE MADE NULL AND VOID FOR WANT OF RECORDING MAY BE MADE VALID and binding by act of the legislature.

LEGISLATURE MAY IMPOSE TAX ON LOCAL DISTRICT TO PAY FOR PUBLIC IMPROVEMENT ALREADY MADE; and such action interferes with no contract, and divests no vested rights.

LEGISLATURE MAY PASS RETROSPECTIVE LAWS AFFECTING PENDING SUITS, giving new remedies, and modifying old ones, or removing impediments in the way of legal proceedings; provided that such laws do not violate the constitutional prohibitions.

DEDICATION OF LAND FOR PUBLIC HIGHWAY MAY BE PRESUMED AGAINST MARRIED WOMAN from the fact of its long-continued use as such by the public during the continuance of a lease of the premises to her, and her failure to resume her rights as a reversioner for four or five years after the expiration of the lease, and until after the street has been graded and paved. Twenty-one years' adverse enjoyment is not necessary to perfect the presumption.

MARRIED WOMAN MAY DEDICATE HER LAND FOR PUBLIC HIGHWAY.

LIABILITY OF LOT FOR STREET GRADING AND PAVING is the expense to the city, whether the work was done by contract or not.

MUNICIPAL CLAIM FOR STREET GRADING AND PAVING IS DUE ON DEMAND, and bears interest from the date of demand.

POWER TO PAVE SIDEWALK INCLUDES POWER to furnish all that is necessary or usual and fit for paving.

WHETHER CURB-STONES ARE CUSTOMARY FOR SIDEWALKS IS QUESTION FOR JURY, not the court.

ASSESSMENT OF PROPERTY FOR STREET GRADING MAY BE MADE UPON EACH FRONTAGE FOOT EQUALLY; and where one person owns several blocks, they need not all be grouped together in one assessment. A joint assessment on separate and distinct pieces of property is not required.

LOT-OWNERS ARE LIABLE TO CITY FOR STREET GRADING, AND ARE NOT AFFECTED by the agreement between the city and the contractors.

EVIDENCE TO CONTRADICT IRRELEVANT TESTIMONY may be properly rejected.

SCIRE FACIAS for a municipal claim for street grading and paving. Mrs. Schenley owned a large tract of land in Allegheny city. At the time of her acquisition of title, it was leased

to Mr. Garrard for twenty-one years. During his occupancy it was laid out in blocks, lots, etc., but under what authority does not appear. The lease expired in 1851, and the streets were allowed to remain open. Mrs. Schenley leased and sold lots conforming to them. She was twenty-three years old when the lease expired, and was married. In 1855-6, the city had these streets graded and paved, and had sidewalks made around the blocks. Mrs. Schenley refused to pay for the same. The claim against her land was then filed in the court of common pleas. Afterwards, and without removal of the claims, ten writs of *scire facias* issued out of the district court against Schenley et ux., to which they pleaded "never indebted," etc. On the trial, the defendants offered evidence to prove negligence and unskillfulness; also that the materials used were not in accordance with the specifications or the city ordinance. The opinion states other facts and points necessary to an understanding of the case.

Williams and Sproul, for the plaintiffs in error.

Hamilton and D. W. Bell, for the defendants in error.

By Court, STRONG, J. This was a *scire facias* to recover the amount of a municipal claim, made by the city of Allegheny against a lot in said city belonging to Mrs. Schenley, one of the defendants. The claim was for the costs and expenses of grading First street. It was filed originally in the court of common pleas, and it is now argued that the district court had no authority to issue a *scire facias* founded thereon. The acts of assembly of June 16, 1836 (Pamph. Laws, 745, secs. 6, 7), and March 13, 1844 (Pamph. Laws, 102, sec. 14), require that all indictments and civil actions in which the city of Pittsburgh or of Allegheny may be directly or indirectly interested shall be tried in the district court, before a jury from which all persons resident or owning property in said city shall be excluded. The acts further provide that the certificate of the mayor's court of the city of Pittsburgh, or of the president judge of the fifth judicial district, composed of the county of Allegheny, that the indictment or civil cause proposed to be removed is, in his opinion, within the meaning of the first (seventh) section of the act, shall be conclusive evidence of the jurisdiction of the district court in such case, and that thereupon the indictment, and all papers connected therewith, if it be a criminal case, or the original writ, declaration, and all papers connected therewith, if it be a civil case, shall be transmitted

to said district court. It is clear that exclusive authority to try the class of cases described in these acts is conferred upon the district court. But it is said that before the jurisdiction can attach there must be a certificate from the president judge of the common pleas. To this it might be answered that even if such a certificate were necessary to bring the case into that court, it would not be for the defendants to object to its absence, after having appeared, pleaded, and gone on to trial. It is not to be denied that when the case is in that court it has authority to try. The objection, therefore, is not to the judicial power of the court, but to the mode in which case is brought before it. If available at any stage of the proceeding, it must have been taken before general appearance and plea in bar.

There was not, however, even an irregularity in the form of proceeding. The district court has general authority to issue writs of *scire facias*. The amount of the claim in this case, and the subject-matter, were completely within its jurisdiction. Even without the acts of 1836 and 1844, there could, therefore, have been no other obstacle in the way of its writ of *scire facias* than the fact that the claim had been filed in another court. It is true that such a writ is, in England, judicial in most cases; and hence it follows that it must issue out of the court in which the record is upon which it is founded. But with us it is often an original, not even resting upon a record. It is often substantially an action of debt, and it cannot, therefore, be fatal to it that its foundation lies in another court. Thus a *scire facias* may be maintained in the common pleas upon a recognizance in the orphans' court.

Municipal claims and mechanics' claims are not strictly records. Acts of assembly have authorized writs of *scire facias* to recover them, but there is nothing in their nature to confine jurisdiction over them to the court among whose records they may be filed. The acts of 1836 and 1844, however, confer upon the district court plenary and exclusive jurisdiction over municipal claims of the city of Allegheny. In that court they must be tried. Surely, an act which declares that certain cases shall be tried in a designated court empowers that court to do all which is necessary to try them. To the exercise of this power, authority to bring the litigant parties before it is essential. Nor do the acts confer jurisdiction over such cases only as may be certified. No provision is made for certifying any other than pending cases. The district court is author-

ized to try all cases. It does not derive its jurisdiction from the certificate, but from the statutes. But if the certificate applies only to cases pending in the common pleas, how can its absence amount to prohibition of a *scire facias* upon a claim, in regard to which there is no case pending? We cannot think the legislature intended the idle form of a *scire facias* first in the common pleas, and then a certificate to the district court, a form the only effects of which would have been to complicate the proceedings, and multiply costs to the parties.

It is next contended that the statement of the claim filed is uncertain and defective, in not setting out the nature, quality, and amount of the work claimed to have been done, with the dates and prices thereof, so as to show how much was referable to cart-ways, foot-ways, grading, and curbing respectively, and also in the omission to state that the work was done within six months previous to the filing of said statement. It is assigned for error that the court refused thus to instruct the jury.

The statement was made out and filed under the provisions of the act of March 30, 1852, Pamph. Laws, 204, and it was in strict accordance with the requirements of that statute. That statute is not an indefinite enactment, authorizing a statement to be filed without prescribing what it shall contain. On the contrary, it points out distinctly what matters the claimant shall set forth. When he has averred those matters, he has laid the required statutory foundation for a writ of *scire facias*. We held, indeed, in *Philadelphia v. Sutter*, 30 Pa. St. 53, that a claim filed under a different act of assembly, that of April 16, 1840, was insufficient, because it did not set forth the time when the paving was done, nor the kind of paving, nor the place where it was done. But that act assimilated the claims filed under it to those of a mechanic or material-man. The act of 1852 likens claims which it authorizes to that of a mortgagee. The act of 1840 did not prescribe what the claim filed under it should be. It only required that certain things should be stated in it. The act of 1852 does prescribe what the form of the statement shall be, and specifically enumerates the averments which it must contain. It also requires a demand of the owner of the lot against which the claim is made before any statement can be filed, as well as an affidavit of all the facts therein set forth. It allows the claim to be filed at any time after demand made, and it enacts that the claim shall remain a lien until paid. There is very little

resemblance between such a claim and that of a mechanic, and consequently, the construction we gave to the act of April 16, 1840, is inapplicable to the statute under which the statement in this case was filed.

It is said, however, that the statement is defective, because it does not contain an averment that the work was done within six months previous to its entry in the common pleas; and in support of this objection, we are referred to the act of April 16, 1845: Pamph. Laws, 488. This would be so if the act of 1845 had any application to this case. But it has not. This claim is based upon the acts of April 5, 1849 (Pamph. Laws, 341), and April 8, 1851 (Pamph. Laws, 372), which made the costs and expenses of grading, paving, etc., streets a lien upon the real estate adjoining. They declared that the costs and expenses should remain a lien until they were fully paid and satisfied. They made, however, no provision for enforcing payment, or even for making the liens matters of record. To remedy these defects, the act of 1852 was passed. That enacted that a statement of the claim might be filed, not within six months from the time the work was done, but at any time after a demand should be made of the lot-owner; and it also reiterated the declaration that the assessment should remain a lien until fully paid and satisfied.

These acts are utterly irreconcilable with that of 1845, and the conclusion is therefore a necessary one, that such municipal claims as the present are not within its provisions. If the statement may be made at any time after demand made for its payment, and if the lien be of indefinite duration, it cannot be requisite to aver that the work was done within six months next previous to its being filed. It was well said by the learned judge of the district court who tried this cause, that the paving acts of different cities cannot be interpreted to constitute a uniform and harmonious system of laws. Nor were they intended to be such.

The fourth and fifth assignments of error relate to the validity of the city ordinance under which the paving was done. That was passed on the twenty-fifth day of June, 1855, but was not recorded as required by law until the ninth of February, 1859. The act incorporating the city of Allegheny declares that such ordinances as shall not be published within fifteen days after their passage in one or more of the public newspapers published in said city, or in such other way as the select and common councils might direct, and recorded within

thirty days in the office of the recorder of deeds for the county of Allegheny, shall be null and void. But on the second of February, 1859, another act of assembly was passed, which, after referring to the ordinance of June 25, 1855, and to the fact that large sums of money had been expended in grading and paving under it, enacted that the omission or failure to record it shall not impair or in any manner affect contracts made in pursuance of it, or any assessment, tax, lien, or claim for the costs of grading and paving done in pursuance of and in accordance with its provisions. The act also empowered the city, or any party interested therein, to proceed to enforce said contracts, and prosecute and collect said assessments, liens, or claims in the same manner, and with like effect, as they might or could have done if said ordinance had been duly recorded within thirty days after the passage thereof, provided the same should be recorded within twenty days after its passage. Within those twenty days it was recorded. But the paving and grading had been done, and this suit was pending before the healing act had any existence.

It is now contended that the district court erred in instructing the jury that the effect of the act of assembly was to render the ordinance as valid and binding as if it had been recorded within the time prescribed by the charter of the city. It is insisted that the enactment was unconstitutional, inasmuch as it created a liability upon the defendants that did not previously exist.

The principle upon which rests that numerous class of statutes which charge lots of ground with the expense of grading and paving the streets in front of them is that the value of the lots is enhanced by the public expenditure. It is obviously just that the property which has been principally benefited should be charged with a share of the expense of the benefit. Now, it has repeatedly been ruled, in this and in other states, that the legislature may impose upon a local district a tax to pay the expense of a public improvement already made. Such laws interfere with no contract, and divest no vested rights. *Thomas v. Leland*, 24 Wend. 65, is a remarkable case of the kind. The public has a right to demand that a lot-owner shall contribute to pay for a public work which has benefited his property, and wherever there is a right, though imperfect, the constitution does not prohibit the legislature from giving a remedy. In *Hepburn v. Curts*, 7 Watts, 300 [32 Am. Dec. 760], it was said: "The legislature, provided it does not violate

the constitutional prohibitions, may pass retrospective laws, such as in their operation may affect suits pending, and give to a party a remedy which he did not previously possess, or modify an existing remedy, or remove an impediment in the way of legal proceedings." What more has been done in this case? The acts of 1849, 1851, and 1852 declared that the costs and expenses of paving and grading the streets should be reimbursed to the city by assessments upon the lots fronting on those streets. This was an assertion of a right in the city to reimbursement, and of a liability in the lot-owner to make it. That right is not dependent for its existence upon the form in which the statutes require it to be asserted. Giving a remedy presupposes the existence of the right. The abstract right is no greater and no less because the work is required to be done under an ordinance. An ordinance was, however, required by the statutes, and one was passed. While it was in force, contracts to do the work were made in pursuance of it, and the liability of the city was incurred. But it was suffered to become of no effect by the failure to record it. Notwithstanding this, the grading and paving were done, and the lots of the defendants received the benefit at the public expense. Now, how can the omission to record the ordinance diminish the equitable right of the public to reimbursement? It is, at most, but a formal defect in the remedy provided—an oversight. That such defects may be cured by retroactive legislation need not be argued.

There is not the least merit in the fifth assignment of error. The evidence shows that the ordinance was properly recorded on the ninth of February, 1859. The times of its publication were conclusively established by the oath of McGonigle, and the direction to publish in the Dispatch was not, of necessity, by ordinance. Had there been no other evidence of direction, it would have been presumed from the record itself.

The next assignment of error has reference to the question whether First street was a "permanent" street within the meaning of the act of April 8, 1851. The authority given to the city was "to grade and regrade, pave and repave, any permanent street, lane, or alley, or sidewalk, or any part thereof." The evidence in this case was that First street was laid out and opened as a public street in 1830, and that it had been traveled and used as such, from that year, without interruption, until it was graded and paved, a period of more than twenty-five years. No objection to its use had ever been made.

This was sufficient, in the first instance, to raise the presumption that the public had a right of passage over it. The defendants, however, requested the court to charge the jury that "if the street was opened for his own convenience or profit, by a tenant renting the land as an inclosed pasture-field from, and holding under, Mr. Croghan, or Mr. Denny, as the executor of O'Hara, by virtue of a twenty-one years' lease, expiring about the year 1851, and during the minority of Mrs. Schenley, the owner, who was before her majority and is yet under the disability of marriage, and residing beyond seas, it is no such dedication as would divest her rights in favor of the public, or render her, or the property through which it passes, responsible in this suit."

The court refused to affirm this proposition, under the circumstances of the case, and we think correctly. It did not legitimately arise from the evidence. It was not in proof upon what terms and conditions Garrard, the alleged tenant, held the land. It was not proved who opened the street, or by what authority it was done. For aught that appeared, it may have been opened under process of law. But if not, if it was opened by the tenant, at his own instance, in the year 1830, the court could not have charged as was requested. That a tenant for years cannot bind his reversioner, by a dedication to public use, must be admitted; but it is not to be maintained that a married woman may not dedicate her land for a public highway. Joining with her husband, she may convey, and therefore a dedication, which is but a limited conveyance, may be presumed against her and her husband. Nor is it necessary to a dedication that there has been twenty-one years of adverse enjoyment, though it is to the presumption of a grant, when time alone is relied upon to raise it. Wherever there is an actual giving of land for a public highway, accepted by the public, though there be no deed, the dedication is complete. The period of twenty-one years of enjoyment, after which a presumption of a grant is made, is fixed from analogy to the statute of limitations; and for the same reason, for which it is not permitted to add coverture to infancy, in order to avoid the running of the statute, must the fact of Mrs. Schenley's coverture after the expiration of Garrard's lease be of no consequence. The facts of the case, as proved and assumed by the defendants, are, that the street was opened in 1830, and devoted to use as a public highway. Grant that the dedication did not then bind Mrs. Schenley.

The street continued open and in constant use until 1851, when the tenant's term expired. Then, instead of disavowing what he had done, instead of closing the street, and resuming her rights as the reversioner, she permitted the street to remain open and used by the public four or five years longer, until after the grading and paving had been done, until after the costs and expenses had been incurred, and never, until the trial of this cause, has she pretended that it was not a permanent street. Under these circumstances, we cannot doubt that the jury should have presumed a valid dedication, and that the court was right in so instructing them.

It is next contended that the court erred in charging the jury that there was nothing in the terms of the contract (made by the city authorities for doing the work) which would warrant its being declared void for want of authority to make it, and nothing which would prevent the city from recovering interest on the assessments from the date of the demand.

The stipulation in the contract that the city should pay only on collection of the assessment from the lot-owners was a stipulation for credit. It was not for the court to say, as matter of law, that it enhanced the cost of the work; and even if it did, the contract would not have been void on that account. The city was under no obligation to do the work by contract. It might have hired men to do it by the day. It could not, indeed, assess upon the lots more than the actual expenses were, and the lot-owner would not be liable for more than reasonable expenses. But in the absence of fraud or gross extravagance, both of which were negatived by the jury, the measure of the liability of the lot was the expense to the city, whether the work was done by contract or not. That expense the lot-owner was bound to pay on demand. It then became due, and of course then began to bear interest. It was the duty of the city to collect it when due. From that time, therefore, it was itself liable to pay interest, and consequently could collect interest from the lot-owner.

There is nothing in the eighth assignment of error. The acts of assembly authorized assessments for paving sidewalks as well as streets. The power to pave includes the power to furnish, and do all that is necessary, usual, or fit for paving. How could the court say, as a legal proposition, that curb-stones were neither necessary, customary, nor fit for such a work? Common observation shows that it is usual to employ curb-stones when streets and sidewalks or foot-ways are paved, and

that they are among the ordinary means used. But whether they are or not was a question for the jury.

Nor is there any merit in the ninth assignment. It is not easy to see what bearing the point proposed, and which the court refused to affirm, had upon the issues tried. Had the proposition been affirmed, it could have interposed no obstacle in the way of the plaintiff's recovery in this case, whatever might have been the effect of a verdict and judgment upon other writs of *scire facias*. The point was, however, answered rightly. First street was a long highway, intersected by other streets. Thus the property of the defendants was divided into ten or more distinct blocks or squares. It would be inconvenient and irregular to have grouped in one assessment these separated and distinct pieces of property. They could not have been sold as one, and they were not liable as one. Nor is there anything in the act of assembly which requires a joint assessment of all the properties which a lot-owner may have upon any one street.

Nor do we see any objection, under the circumstances of this case, to the mode in which the assessments were made upon these different blocks. The defendants were owners of all the property on both sides of First street. An equal assessment was made upon each foot of the frontage on the street. This was consistent with the acts of assembly, and not at all injurious to the defendants.

The eleventh, twelfth, and thirteenth points of the defendants assume that the substantial plaintiffs in the suit were the contractors who did the grading and paving, and not the city which employed them. On this hypothesis, it was contended that there could be no recovery in this action, because, for certain assigned reasons, it is thought the contractors could not have recovered against the city. We think the assumption is without foundation. It has nothing more to sustain it than a clause in the contract making the time of payment by the city contemporaneous with the payment of the assessments by the lot-owners. That stipulation gave to the contractors no interest in the assessments, either in law or in equity. It was wholly for the protection of the city, not to give new rights to the contractors. Their only remedy is against the city. But if the contractors are not the real or substantial parties plaintiff, the defendants have no concern with the state of things between them and the city. As lot-owners, they are liable, under the statute, for the costs and expenses of grading and

paving, no matter how it was done, whether by contract or not, and no matter who may have been the immediate agents in doing the work. They have no interest in anything beyond the amount of the expenses. We hold, therefore, that the district court was right in the answers given to these points.

It is only necessary to remark in regard to the fourteenth assignment, that the acts of assembly make the measure of liability of the lots, not the value of the work done, but the costs and expenses. The work may not have proved so valuable as was expected, but if there was no fraud nor carelessness (and the jury have found that there was none), the city had a right to recover the cost.

The points reserved have already been considered in what we have said respecting the several assignments of error.

It remains only to add, that it is impossible for us to discover from the bill of exceptions whether the testimony of Captain Hays, offered and rejected, was contradictory of anything material, which had been proved by Mr. Boyd. We cannot, of course, say that the defendants may have been injured by its being overruled. It would seem, from the reasons given by the judge for rejecting it, that the testimony which it proposed to contradict was itself irrelevant and immaterial. If so, it was not competent for the defendants to call a witness to raise an issue upon it.

The judgment is affirmed.

APPEARANCE WAIVES ALL IRREGULARITIES: *Pisley v. Winchell*, 17 Am. Dec. 525, and numerous cases cited in note thereto. As to when objection to irregularity may be waived by joining issue, see *Oulpeper etc. Society v. Digges*, 18 Id. 708.

SCIRE FACIAS IS ALWAYS FOUNDED UPON RECORD, and issues from, and is made returnable to, the court where the record is kept: *Walker v. Wells*, 63 Am. Dec. 252.

LEGISLATURE HAS NO POWER TO MAKE VOID PROCEEDING VALID: *McDaniel v. Correll*, 68 Am. Dec. 587.

RETROSPECTIVE LAWS IMPAIRING VESTED RIGHTS OR CREATING PERSONAL LIABILITIES ARE UNCONSTITUTIONAL AND VOID: *Coffin v. Rich*, 71 Am. Dec. 559, and note 567; notes to *Boston v. Cummins*, 60 Id. 726; *Railroad Co. v. Dickerson*, 66 Id. 148, and note 152; *Greenough v. Greenough*, 51 Id. 574, note.

RETROSPECTIVE LAWS, REMEDIAL IN THEIR NATURE, and which do not impair vested rights, may be constitutionally enacted by the legislature: *Raupe v. Kennedy*, 58 Am. Dec. 289; *Coffin v. Rich*, 71 Id. 559; *Wynne v. Wynne*, 58 Id. 66, and note 73; *Boston v. Cummins*, 60 Id. 717, and note 726; *Railroad Co. v. Dickerson*, 66 Id. 148, and note 152; *Greenough v. Greenough*, 51 Id. 574, note. The power of a state legislature is supreme so long as it does not act in contravention of the constitution: *Boston v. Cummins*, 60 Id.

717, and note 726. Thus a retrospective act which relieves from mere informality in the certificate of a magistrate, but which creates no new title, and affects no right that did not equitably flow from the grantor's act, is not unconstitutional: *Cheest v. Shand's Lessee*, 47 Id. 387.

LEGISLATIVE CONTROL OVER REMEDIES: See extended note to *Morac v. Gould*, 62 Am. Dec. 112; *Lord v. Chadbourne*, 66 Id. 290.

DEDICATION OF LAND FOR PUBLIC HIGHWAY MAY BE PRESUMED WHEN: *Livingston v. Mayor of New York*, 22 Am. Dec. 622; *Abbott v. Mills*, 23 Id. 222, and note 220; *State v. Trask*, 27 Id. 554; *Valentine v. Boston*, 33 Id. 711; *Hobbs v. Lowell*, 31 Id. 145; *Thayer v. Boston*, Id. 157; *Vick v. Vicksburg*, 31 Id. 167; *State v. Hunter*, 44 Id. 41; *French v. Martin*, 57 Id. 294, and citations in note thereto 299. User for twenty years is unnecessary to establish such dedication: *Stacey v. Miller*, 55 Id. 112; as no time is prescribed by law as essential to securing the enjoyment of a dedication: *Cole v. Sprovel*, 56 Id. 606; *Deinel v. Barnard*, 48 Id. 507.

MARRIED WOMAN MAY DEDICATE HER LANDS FOR PUBLIC HIGHWAY: See extended note to *State v. Trask*, 27 Am. Dec. 560, discussing dedication to public use at large, and showing therein who may dedicate.

WHERE OWNER OF URBAN PROPERTY LAYS OFF AND SELLS LOTS in reference to plat on which streets are laid out, his acts will amount to a dedication of the streets to the public: See note to *State v. Collins*, 23 Am. Dec. 230.

COST OF GRADING STREET TO BE ESTIMATED BY FRONTAGE FEET: See *City of Louisville v. Hyatt*, 36 Am. Dec. 594; *Garrett v. City of St. Louis*, 69 Id. 475. Street assessments, generally, will be found considered in *People v. Mayor of Brooklyn*, 55 Id. 266, and extended note thereto 285-290; *Hill v. Higdon*, 67 Id. 289, and notes to same 296.

WHERE LANDS IN CITY OR TOWN ARE DIVIDED INTO LOTS, they must be valued by lots, and not by blocks, in making assessments upon them for opening streets: *Sharp v. Johnson*, 40 Am. Dec. 250.

IMMATERIAL EVIDENCE IS PROPERLY REJECTED: *Loyland v. Boring*, 15 Am. Dec. 41. The offering of improper evidence by one party does not justify the introduction of similar evidence by the other party. So irrelevant testimony cannot be admitted as an answer to irrelevant testimony: *Baltimore etc. R. R. Co. v. Woodruff*, 59 Id. 72.

THE PRINCIPAL CASE WAS CITED in each of the following authorities and to the point stated: Retroactive legislation is not necessarily unconstitutional, especially where it only affects remedies: *Commonwealth v. Duffy*, 96 Pa. St. 515. And in cases where the constitutional power of the legislature to modify, enlarge, or repeal existing remedies, and to remove legal impediments in the way of recovery, even when pending in a court of error, has been recognized, the right to costs has never been supposed to interpose an obstacle: *Grim v. Weissenberg School District*, 57 Id. 438. In *Weister v. Hade*, 52 Id. 481, the court referred to the principal case as being a strong example of the legislative power to operate, not only retrospectively, but also to subject private property to an assessment for what was deemed a public benefit. And after quoting from the principal case the language of Strong, J., concerning the power of the legislature to impose a tax upon a local district to pay the expense of a public improvement already made, etc., the court cited *Thomas v. Leland*, 24 Wend. 65, as being a remarkable case of this kind. "These cases," said the court, "establish two things: 1. The power of the legislature to legislate retrospectively in all matters not penal, not violative

of contracts, and not expressly forbidden by the constitution; 2. To act directly upon individual rights. The legislation in such cases is special and immediate, and not simply a consequence arising from the exercise of a general and undoubted power." Municipal taxes for improvement of streets rest for their final reason upon the enhancement of private properties: *Hammett v. Philadelphia*, 65 Pa. St. 166; *McGonigle v. City of Allegheny*, 44 Id. 121. The time, mode, and manner of taxation are committed altogether and exclusively to the legislative discretion, and states and cities cannot exist without taxation: *Commonwealth v. Woods*, Id. 116. A giving of land for a public highway and an acceptance by the public will render a dedication thereof for that purpose complete without a deed: *Pittsburgh etc. Ry. Co. v. Dunn*, 56 Id. 284. Failure to record an ordinance, although such failure causes its death, is a technical defect which the legislature may remedy: *Commonwealth v. Marshall*, 69 Id. 332; *Marshall v. Mayor etc. of Allegheny City*, 59 Id. 461.

A city is under no obligation to do work by contract. It may hire men to do it by the day. And the city councils have a right to revoke a contract for grading a street, and enter into a new one at a higher rate, and without the consent of the land-holders, where a contractor has failed to keep his contract with the city, and where they act in good faith and without any fraud and collusion. They are not obliged to first exhaust their legal remedies against the contractor and his bondsmen, but may compromise the matter by letting a new contract on fair and reasonable terms: *Marshall v. Mayor etc. of Allegheny City*, 59 Pa. St. 460. In a suit by a city against a land-holder for his share of the expense, etc., of paving a highway, an averment that the contract for such paving was not considered by the department of highways cannot be inquired into by the defendant: *Hammett v. Philadelphia*, 65 Id. 170. In the early cases, the mode of determining the benefits, to pay the damages and the cost of construction for grading, curbing, paving, etc., was by actual view and assessment. These were followed in later cases. Afterwards came the frontage mode of equal valuation per foot front, adopted in the principal case: *Seely v. City of Pittsburgh*, 82 Id. 364; but in this case the frontage rule of valuation, whereby the cost of the paving of streets or other municipal improvements is assessed upon the property holders abutting upon the street, in proportion to the number of feet their property fronts thereon, while it may be a just mode of assessing the cost upon compact city lots, where the properties do not materially differ in value, was held inapplicable where the street or improvement is made through rural or suburban districts, and the act of April 2, 1870, in so far as applied to this mode of assessment to such districts was declared to be unconstitutional. The treasurer receives all the assessments, either directly or through the city attorney, and is to pay the contractor from the moneys to be assessed and collected for costs of grading or filling, etc.: *Hutchinson v. Pittsburgh*, 72 Id. 326. So if an owner pays the contractor part of the cost, and the contractor afterwards assigns his claim for value, and without notice to the assignee or the city of the payment, the city, to the use of the assignee, can recover the whole amount: See case last cited. Curbing necessary for the proper support and protection of a street is a proper charge for paving, and for which the land-holder is liable: *Allegheny City v. Blair*, 74 Id. 230.

SNYDER'S APPEAL.

[26 PENNSYLVANIA STATE, 106.]

ORPHANS' COURT IS ONE OF LIMITED POWERS; and though it is a court of equity, it has no jurisdiction except what is conferred upon it by statute. IT IS ONLY IN CERTAIN CASES OF JOINT TENURE THAT ORPHANS' COURT IS AUTHORIZED TO MAKE PARTITION, and these cases are defined by statute. JURISDICTION OF ORPHANS' COURT IN PARTITION is limited by statute to the partition of a single estate. JURISDICTION OF ORPHANS' COURT TO MAKE PARTITION OPERATES ON TITLE OF DECEDENT only, and not upon that of the heirs. It is because it is the land of a decedent, and not because it is the land of heirs, that this court is empowered to make partition. ORPHANS' COURT HAS NO JURISDICTION TO DECREE PARTITION ON ONE PROCEEDING OF TWO ESTATES held in common by the same parties, and as the heirs of two different persons.

APPLICATION by two of the devisees of John Snyder, deceased, to set aside certain proceedings instituted in the orphans' court for the partition of the real estate of John Snyder and Catherine Snyder. It appeared that John Snyder, at the time of his death, was tenant in common with his brother and sister of a tract of land containing four acres; and that of another tract containing nine odd acres he was tenant in common with his wife, who had inherited one half thereof from her father. By his will, he gave to his wife, Catherine, a life estate in this property, and at her death it vested in his devisees, subject as to two of the shares to certain trusts. Upon the death of Catherine Snyder, intestate, her undivided moiety descended to her children, who were also the devisees under her husband's will. The title to the whole tract was thus vested in the same parties. Jacob R. Snyder, one of the devisees under the will of his father, and an heir of his mother, presented his petition for an inquest to part and divide all the property above mentioned, as well that held by his father in common with his brother and sister as that which belonged in common with his father and mother. The inquest was awarded and the property appraised, but the confirmation of the inquest was opposed by John M. Snyder and George Snyder, two of the other children of decedents, who prayed the court to set aside the proceedings. The question involved was, whether such partition could be effected in one and the same proceeding. The court below confirmed the inquisition as to the undivided third part of the four acres, and set aside the proceedings as to the other tract.

Parsons, for the appellant.

J. A. Phillips, for the appellees.

By Court, *Strong, J.* This attempt to make partition in the orphans' court of two estates in one proceeding cannot be sustained. Within its appropriate limits, the power of that court is ample, and it is unembarrassed by forms. Being a court of equity, it can mold its process and decrees according to the necessities of the case which it has in hand; but it is not a court of general jurisdiction. The law has conferred upon it only limited powers. Thus it is only in certain cases of joint tenure that it is authorized to make partition. What those cases are, is well defined in the acts of assembly which have conferred upon the court its powers; and to those acts we must look, rather than to our conceptions of what might be convenient. Unless the power to make partition in a particular case is there found, the court does not possess it. It is quite apparent, from an examination of the act of March 29, 1832, that when the legislature committed to the orphans' court the power to make partition of the lands of a decedent, they had in view no more than action upon a single estate. It was not the fact that the tenure was joint, nor was it the age or right of the persons upon whom the law cast the inheritance, that was made to give the court jurisdiction; but it was the fact that there was land of an intestate of which he had died seised, and which in consequence was in charge of the court for allotment under the intestate laws. The act looked only to the title of the decedent. It was because it was land of a decedent, not because it was land of heirs, that the court was empowered to make partition. The whole act contemplates the division, in one proceeding, of but a single estate. Nor did the act of the thirteenth of April, 1840, which enabled the court to make partition in cases of testacy, when the course of descent is not changed, or where some of the parties are minors, indicate any different legislative intention. The act also of April 10, 1849, which gave the court jurisdiction over undivided interests of a decedent, evinces a purpose to intrust the court with the power to make partition or allotment of that only of which the one decedent died seised. Over his interest alone is the court given authority. Now, when it is remembered that the power of the orphans' court to make partition is not a general power, that it is confined to cases described by the statutes, it seems clear that it is not large enough to cover the case of the appellant.

Its non-existence may also be inferred from the directions given by the acts of assembly respecting the mode in which partition is to be made in all cases committed to the jurisdiction of the court. They are not adapted to the division of two estates; and any attempt to apply them to such a division would be attended with great practical difficulties, and in some cases would amount to a substantial denial of a statutory right. Thus in the present case, the oldest son of John Snyder, one of the decedents, has a right to take the moiety of which his father died seised, at the valuation. If his mother's moiety may be valued with that of the father, he can only accept the one by accepting both. The debt incurred by accepting half he might pay; the aggregate valuation of both might be a burden too heavy. Again, it is possible some of the heirs may have been advanced by one of the ancestors. How are these advancements to be settled in such a proceeding as the present? And if the property be not accepted at the valuation, to whom is the order of sale to be committed—to the personal representatives of the father, or to those of the mother? To one or to the other it must be; for it can only be made to a trustee when there is no executor or administrator, or when such personal representative neglects or refuses to act. And even if there could be a sale according to the directions of the acts of assembly, the difficulties are not all removed. The proceeds of sales in partition may be applied by the personal representative to the payment of such debts of the decedent as have not lost their lien by the lapse of time: *Commonwealth v. Pool*, 6 Watts, 82. Could the executors of the father's will pay the debts of the mother? The legislature contemplated no such anomalies. Nor is there any necessity for the existence in the orphans' court of a power to combine into one its acknowledged jurisdiction over two estates. The appellant may find all that he needs in the court of common pleas. Certainly, since the act of the twenty-first of April, 1846, there is no difficulty in his way.

The decree of the orphans' court is affirmed.

ORPHANS' COURT HAS CHANCERY POWERS: See *McPherson v. O'Neill*, 14 Am. Dec. 642; *App v. Dreisbach*, 21 Id. 447. In fact, it is strictly a court of equity within the limits of its jurisdiction: *Lewis v. Lewis*, 53 Id. 443. But the rule is not uniform that such a court is one of limited jurisdiction. Some cases hold that courts of ordinary, orphans' courts, and probate courts generally have a general jurisdiction; others, that the jurisdiction is special and limited: See *Apperson v. Corttrel*, 29 Id. 239; notes to *Worthy v. Johnson*, 52 Id. 407;

Morrow v. Weed, 66 Id. 122, and cases cited in note thereto 137; *Wyatt v. Rambo*, 68 Id. 89, and note 101; *Bush v. Lindsey*, 71 Id. 117, and collected cases in note to same 118; *Michael v. Baker*, Id. 593, and citations thereto in note 595. *Wyatt v. Rambo*, 68 Id. 89, shows that an orphans' court may have a general jurisdiction as to some matters and a limited one as to others. It is declared in Maryland to have a limited jurisdiction: *Michael v. Baker*, 71 Id. 593. And where it is determined to be an inferior court, the jurisdiction must be shown: See note to *Smith v. Silence*, 66 Id. 137. Jurisdiction of orphans' court to decree partition: *Feather v. Strohoecker*, 24 Id. 342, and note 345.

CITATIONS OF PRINCIPAL CASE.—While the orphans' court, in matters within its jurisdiction, proceeds on the same principles as a court of chancery, it seems that the ancillary powers of such a court have not been given to it. It is a special tribunal for specific purposes; and its resemblance to a court of equity consists in its practice of proceeding by petition and answer, containing the substance, but not the technical subtleties and nice distinctions, of a bill in equity; by which, however, justice is obtained more conveniently and as certainly as in courts of equity, purely so called: *Willard's Appeal*, 65 Pa. St. 267. In this case, the principal one was cited to the point that as the orphans' court has not the general powers of a court of equity, it cannot entertain a bill of discovery. The principal case, where an unsuccessful attempt was made to obtain in the orphans' court a partition of two estates, held in common by the same parties as the heirs of two different persons, has no application in a case where one tenant in common of an original tract has undertaken, without right, to make conveyances in severalty of different parts of the same, and where the only question is, whether the defendants can be joined in the same action of partition, or whether each must be proceeded against severally for the tract or parcel of which he is the tenant. So distinguished in *Harkas v. Langham*, 69 Id. 239.

CAMPBELL AND PHARO'S APPEAL. SINNER'S APPEAL.

[36 PENNSYLVANIA STATE, 267.]

WHERE MECHANICS' LIENS ARE ENTERED AGAINST EQUITABLE ESTATE, their value depends upon that estate, and they survive or perish with it.

MORTGAGE UPON LEGAL ESTATE FOR PURCHASE-MONEY IS ENTITLED TO PRIORITY OVER MECHANICS' LIEN against the equitable estate of the vendee under a contract of sale, although by agreement between the vendor and vendee a third person takes the title and gives the mortgage to one who advances the purchase-money.

UNION OF LEGAL AND EQUITABLE ESTATE, so as to give a priority to the liens on the latter, never takes place against the intention of the parties, where that intention is manifested.

MERGER INSUFFICIENT TO LET IN MECHANICS' CLAIMS AGAINST EQUITABLE ESTATE OF VENDEE.—Where the vendee under a contract of sale fails to pay the purchase-money, and the vendor and vendee agree that a third person shall take the title and give a mortgage to one who advances the purchase-money, and the deed and mortgage are executed simultaneously, it is not such a merger or extinguishment as will let in mechanics' claims against the equitable estate of the original vendee.

IN 1853 E. H. Eldridge owned a lot of ground, and verbally agreed to sell it to R. Q. Gibbon, to be paid for in cash, or by Gibbon paying off a mortgage which covered this and an adjoining lot belonging to Eldridge, the title to be made when these stipulations were complied with. Gibbon immediately took possession, and began the erection of a building, which he planted partly on this lot and partly on an adjoining lot belonging to his mother, Mary M. Gibbon. R. Q. Gibbon failed to keep his contract with Eldridge, and they finally agreed that Mrs. Gibbon should take the title to the lot, and give a mortgage for the purchase-money, which mortgage should be sold, and Eldridge paid out of the proceeds. Accordingly, a loan was negotiated with Weldon & Tomlinson. A deed was given by Eldridge to Mrs. Gibbon, who at the same time executed a mortgage to Weldon & Tomlinson for the purchase-money. At the time of the conveyance to Mrs. Gibbon the building was subject to certain mechanics' liens for work and materials done and furnished by the appellants, among others, in and about its erection and construction, under contracts with R. Q. Gibbon. Weldon & Tomlinson subsequently foreclosed the mortgage, and the premises were sold at sheriff's sale, and the proceeds referred to an auditor for distribution. The fund in court proved insufficient for the discharge of all the liens against the premises, and it became necessary to determine the question of priority as between the mortgage and the mechanics' liens. The auditor awarded the whole fund to the mortgagees; it being, however, insufficient to satisfy their claim in full.

Briggs, for the appellants.

Cuyler, for the appellees.

By Court, LEWIS, C. J. The mechanics and material-men furnished their work and materials, in this case, entirely on the credit of the equitable estate then in Robert Q. Gibbon. They had neither an equitable nor legal right to anything beyond that estate, and they were as much bound to stand aside in favor of the vendor's claim for the purchase-money, supported as it was by the legal estate, as Gibbon himself was.

But it is supposed by their counsel that there was a door left open by means of which they might enter upon the legal estate, after it was conveyed to Mary M. Gibbon, and before she executed the mortgage for the purchase-money. But un-

fortunately for their enterprise, there was no interval of time between the delivery of the deed and the mortgage. They were executed at the same time, and are to be taken as a single transaction. It is true that the deed came from Eldridge to Mary M. Gibbon, and the mortgage was from Mary M. Gibbon to Weldon & Tomlinson. But the mortgage was given to provide for the purchase-money, under an arrangement made by the mortgagor, the vendor, and the mortgagees. The material circumstance in the case is, that the money was advanced by Weldon & Tomlinson on the faith of this arrangement, and under a representation that the mortgage was for the purchase-money. The whole transaction shows that there was no intention whatever to permit Mary M. Gibbon to acquire the legal estate for an instant discharge of the purchase-money, and the acts of the parties show that they carried out their intention.

It is true that the mortgage is not valid against the mechanics' liens for anything more than the purchase-money, but the proceeds in court will not satisfy even that amount.

Where mechanics' liens are entered against an equitable estate, their value depends upon that estate, and they survive or perish with it. When that estate is founded upon a contract of purchase, every partial payment increases the security of the liens. Even if the money be borrowed for the purpose, the lender gains no priority over the prior liens on the equitable estate, unless he advanced his money upon a contract with the holder of the legal estate, and on the security of that estate. *Lynch v. Dearth*, 2 Penr. & W. 101, was the case of money loaned without any contract with the holder of the legal estate. In that case, the prior liens were preferred to a mortgage given for the money borrowed to pay the vendor. *Lyon v. McGuffey*, 4 Pa. St. 126 [45 Am. Dec. 675], was a case where there was an interval of seventeen days between the conveyance of the legal estate and the entry of judgment for the purchase-money. After such a long interval, it was impossible to say that the delivery of the deed and the entry of the judgment were one transaction, and it followed that the liens on the equitable estate gained a priority over the judgment for the purchase-money.

The case now before us differs from both the cases cited. It differs from the last in the material circumstance that the delivery of the deed and the execution of the mortgage took place at the same time, and were one transaction. It differs from the first in the still more important particular that the

money was not advanced on the credit of the equitable estate at all, but distinctly upon the security of a mortgage upon the legal estate for the purchase-money, under a contract with the vendor himself. The deed was made for the purpose of enabling the vendee to execute this mortgage, and not for the purpose of uniting the legal and equitable estate so as to give a priority to the liens on the latter. Such a union, whether it be called merger or extinguishment, never takes place against the intention of the parties where that intention is manifested, and where equity requires that the distinction should be presented. The mortgagees are therefore entitled to the fund in court.

Decree affirmed.

MECHANICS' LIEN AGAINST SIMPLE EQUITY must be confined to that, and a sale of the equitable interest must be subject to the rights of the legal owner: See note to *Lyon v. McGuffey*, 45 Am. Dec. 679, showing what estates and interests are affected by mechanics' liens.

MECHANICS' LIEN AGAINST INTEREST OF PURCHASER WHO HOLDS BOND FOR CONVEYANCE IS SUBORDINATE to the vendor's lien for the unpaid purchase-money: *Gillespie v. Bradford*, 27 Am. Dec. 494, and note showing the priority of vendor's lien over liens acquired against the vendee; note to *Lyon v. McGuffey*, 45 Id. 679.

MECHANICS' LIEN ON EQUITABLE ESTATE WILL ATTACH TO AFTER-ACQUIRED LEGAL TITLE the moment it vests in the same person: *Lyon v. McGuffey*, 45 Am. Dec. 675.

MERGER OF ESTATES IN REALTY TAKES PLACE, WHEN: *Pratt v. Bank of Basington*, 33 Am. Dec. 201, and note 202; *Moore v. Luce*, 72 Id. 629, and note 632; *James v. Morey*, 14 Id. 475, and note 512-514, on merger. But merger of estates is not favored in equity, and even where two or more rights or estates are united in one person, equity will keep them distinct, if from the intention of the party, express or implied, he wishes them so kept: *James v. Morey*, 14 Id. 475.

CITATIONS OF PRINCIPAL CASE.—In *Forrester v. Hanaway*, 82 Pa. St. 224, the principal case was cited to the point that where liens are entered against an equitable estate, their value depends on that estate, and they survive or perish with it. Such a lien creditor runs the risk of the estate of his debtor being recovered by the holder of the legal title by means of a fair and usual proceeding at law; but he has a right to claim protection against a fraudulent combination to divest his lien: *Id.* The principal case was cited in *Albright v. Lafayette etc. Association*, 102 Pa. St. 417, by way of illustrating the point that a mortgage to secure purchase-money, given by the vendee simultaneously with the conveyance of the land, does not necessarily lose that character because taken in the name of a person not the vendor but by the vendor's procurement. In the principal case, said Clark, J., "Weldon & Tomlinson advanced the money to pay the purchase, on a contract with the vendor himself, who made the deed and delivered it to the vendee, under the express agreement that a mortgage and bond should be made at the same time to Weldon & Tomlinson for the purchase-money as such. The mortgage pro-

fessed, upon its face, to be for the purchase-money, and although given to a third person, was held to be a purchase-money mortgage, and to have precedence of mechanics' liens, entered against the equitable estate." It was held, however, in this case, that where a vendee borrows the consideration money from a stranger to pay for a purchase and gives a mortgage to the stranger simultaneously with the conveyance to himself, it can never be a purchase-money mortgage. It is the money of the borrower, and he may apply it as he pleases. It follows, therefore, that a mortgage given to secure its repayment would not be a purchase-money mortgage, whether the money was so used, or used for any other person: See p. 418. In *Nottes's Appeal*, 45 Id. 363, 364, a widow was held to be entitled to her exemption out of the estate of her deceased husband under the act of the fourteenth of April, 1851, in preference to a judgment creditor who had loaned money to him to pay for a house and lot of which he died seised. The facts of the principal case were summarized; but the facts of *Nottes's Appeal*, *supra*, showed that there was no communication between the vendor and the one who advanced the purchase-money as to the latter's security for it. The legal title was not conveyed to the purchaser for the purpose of being mortgaged to the one who advanced the purchase-money. It was not mortgaged at all; and between the latter and the vendors no treaty whatever occurred. Besides, said the court, the widow's lien is not a mere lien like that of mechanics, but an absolute and unconditional gift, except only as against vendors and those who claim under them. The auditor and court below found in the principal case principles which carried this case against the widow; but the appellate court held that it was wrong to rule this case by the principal one.

KISSECKER v. MONN.

[36 PENNSYLVANIA STATE, 312.]

LIABILITY FOR CONSEQUENTIAL DAMAGES IN EXCEEDING LICENSE OR ABUSING AUTHORITY.—If one having a right, by license, to enter upon another's land, for a lawful purpose, exceed his license or abuse his authority, he is liable for consequential damages arising from his wrongful act, in an action of trespass *quare clausum fregit*.

TRESPASS QUARE CLAUSUM FREGIT MAY PROPERLY BE BROUGHT AGAINST PARTY HAVING LICENSE TO ENTER ON ANOTHER'S LAND, who, in taking down a gate erected thereon to enable him to enter, neglects to restore it to its place, in consequence of which his swine trespass upon the plaintiff's land. And defendant, under this form of action, may be held liable for the damages thus occasioned.

WHEREIN ALL OF SEVERAL COUNTS ARE GOOD, JUDGMENT MAY BE ENTERED ON ALL OF THEM, though the evidence is applicable only to some of them. It does not hurt the defendant.

TRESPASS *quare clausum fregit* by Monn against John Kissecker. Fullerton owned a tract of land, on which stood a grist-mill. In 1808, he conveyed a part of it to Snyder, under whom the plaintiff claimed title, but reserved his right and privilege in the tail-race and ground over which it flowed to his mill, so far as the tail-race ran through the land conveyed.

In 1818, Fullerton conveyed the remainder of the tract to Nicholas Kissecker, the defendant's father; and upon his decease, the mill and one hundred and two acres of the tract were, on partition proceedings, adjudged to the defendant. From the date of the grant to Snyder, the defendant, and those under whom he claimed, enjoyed, and exercised the right to enter upon the land so granted to Snyder, for the purpose of cleaning the tail-race of his mill. In 1858, the defendant entered upon the plaintiff's land to clean the tail-race, and in order to do so, removed a water-gate erected across it by the plaintiff, and which he neglected to replace. In consequence thereof, the defendant's swine entered upon the plaintiff's meadow, and injured his grass. For this injury the present action was brought. Kimmell, P. J., in answer to points presented by the plaintiff and defendant, instructed the jury as follows: "In this action the plaintiff claims to recover damages from the defendant for removing the water-gate across the tail-race flowing through the plaintiff's land, whereby the defendant's hogs, and others, had access to the plaintiff's meadow, rooting it up and destroying the grass growing there. The lands of these parties, at one time, were owned by David Fullerton, and when he sold by deed to Philip Snyder, under whom the plaintiff holds, in 1808, the right to this tail-race was reserved. In the agreement produced, indorsed on the deed referred to, Snyder declares that before the execution and delivery of the deed, it had been agreed between the parties thereto 'that David Fullerton, his heirs, executors, administrators, and assigns, shall have and enjoy the free use and privilege now enjoyed of the ground through which the water passes, through from the tail-race of his, the said David Fullerton's, mill, so far as the same extends through the premises as above conveyed to the said Philip Snyder.' The title to the mill property is now vested in the defendant, and he alleges that he and those under whom he claims have had 'the free use and privilege' of the tail-race from the date of the deed to the present, and that the owners of the mill have entered upon the land, over which it runs, from time to time, with harrows, plows, and horses, for the purpose of cleaning the race, whenever it suited their purpose. Under this agreement, the defendant had an undoubted right to enter through and upon the plaintiff's land 'to remove obstructions from natural and artificial causes' in the race, whenever it became necessary, as he and those under whom he claims have enjoyed the right

for the last twenty-one years. The plaintiff does not complain that the defendant exceeded his license in the flow of the water, or the enlargement of the race; nor is it pretended that he had not the right to enter the lands of the plaintiff for all purposes connected with the full enjoyment of the race, but the plaintiff's counsel allege that he abused his authority after he was on the premises, in this, that he refused to restore the fence after the work at the watercourse was done. It seems that this gate was put up in 1848, and that before that time there was a fence of poles at that point, and that both formed part of the inclosure of the meadow. The defendant does not deny having taken away the gate, and we instruct you that under the agreement he had the right to take it down, to enable him to clean the race, as was the custom of the owners of the mill. But in doing so, he was bound to respect the rights of the owner of the soil, doing as little injury as possible, and using the land no further than was necessary to the full enjoyment of the right. He alleges that it was necessary to remove the gate, so that the horses, plows, and harrows might pass up and down the body of the race, and this seems to be admitted; but was it necessary, also, that the gate should be kept away? This is not pretended; but the defendant says it was not his business to restore it again to its former position. The defendant had the right, under the grant, to enter upon the lands of the plaintiff at any point that might be deemed necessary to reach the race. Suppose he had made his entry at the bars, about which there was some parol agreement, or through the fence by laying it down, was he bound to close up the opening again? If he was not, it was in his power to make a common of the plaintiff's meadow, for his own and other people's swine and cattle. It will scarcely be pretended that this was a part of his privileges; the gate was only part of the inclosure, and the obligation to close it was as imperative as to close the fence at any other point. If the gate had obstructed the free flow of the water, this would have constituted a sufficient justification for the removal; but this is not alleged. It was, therefore, the duty of the defendant to restore the gate when he finished cleaning the race; any other rule would place the plaintiff's meadow at the defendant's mercy. But the question is, Can the plaintiff recover in this form of action? The defendant says he cannot, because he was authorized, under the grant, to enter; and that having entered by license, he cannot be held for consequential damages, in an

action of trespass *quare clausum fregit*; that if the plaintiff has a right of action, it should have been case. We have already said that the defendant had the right of entry, and there can be no recovery here, unless he exceeded the license, or abused his authority. If he did, he must be treated as if he had entered without license. If the defendant took down the gate, and refused or neglected to restore it to its place again, after the necessity for its removal was gone, and his swine entered the meadow at that point, and committed the injuries complained of, then he did abuse his authority, and the plaintiff is entitled to recover. The jury will estimate the damages." Defendant excepted to this charge. Verdict and judgment for plaintiff for seven dollars and fifty cents. Whereupon defendant sued out his writ of error; and also assigned that the court erred in taking the verdict and entering the judgment upon all of the counts in the declaration, the evidence being applicable only to the second and third counts. The first was the usual common count in trespass *quare clausum fregit*; while the second and third particularly set forth the facts of the case.

Reilly and Sharp, for the plaintiff in error.

Nill and Kennedy, and J. H. McCauley, for the defendant in error.

The COURT. The charge of the learned judge of the common pleas is so well adapted to the case, and so just in its principles, that we do not feel called upon to do more than express our approval of it. It is quite evident that the verdict is founded on the second and third counts; but the first is good, and it does not hurt the defendant that the judgment was entered on all of them.

Judgment affirmed.

ADAMS EXPRESS COMPANY v. EGBERT.

[36 PENNSYLVANIA STATE, 360.]

DAMAGES FOR BREACH OF CONTRACT MUST BE PROXIMATE CONSEQUENCES OF BREACH. A possible loss is not sufficient ground for compensation.

LOSS OF PROFITS WHICH MUST HAVE RESULTED FROM FULFILLMENT OF CONTRACT may be compensated in damages.

FAILURE OF EXPRESS COMPANY TO DELIVER ARCHITECTURAL PLANS, by which the sender thereof is prevented from competing for a premium, results in a proximate loss—the loss of opportunity to compete—and for such loss the sender may recover damages.

LOSS OF OPPORTUNITY TO COMPETE FOR PRIZE IS SUCH LOSS AS WILL ENTITLE INJURED PARTY TO NOMINAL DAMAGES; but to recover more, actual injury must be proved.

ASSUMPSIT. The opinion states the facts.

Williamson and S. Hepburn, for the plaintiff in error.

Watts and Parker, for the defendant in error.

By Court, **STRONG, J.** The express company are common carriers. In 1858 they received from the plaintiff below a box containing plans and specifications, to be forwarded to a committee who had offered a premium of five hundred dollars to the successful competitor for the best plans for the Touro alms-house, at New Orleans. The plaintiff's drawings were sent for competition. In consequence of the default of the company, they were not delivered until after the appointed day for receiving them, nor until after the premium had been awarded. The committee was, however, then convened, and the plans were examined. On the trial, it was proved by one member, the only one whose testimony was taken, that, in his opinion, the plans, had they been received in time, would not have been adopted, because they did not suit the climate, and because they were altogether objectionable. This is an action against the company to recover damages for the breach of their contract to deliver in time, and the question is, What is the proper rule for the measurement of damages?

It is doubtless true that in all actions for the breach of a contract, the loss or injury for which damages are sought to be recovered must be a proximate consequence of the breach. A remote or possible loss is not sufficient ground for compensation. There is no measure for those losses which have no direct and necessary connection with the stipulations of the contract, or which are dependent upon contingencies other than the performance of the contract, and which are therefore incapable of being estimated. With no certainty can it be said that such losses are attributable to the wrongful act or omission of him who has violated his engagement. But on the other hand, the loss of profits or advantages, which must have resulted from a fulfillment of the contract, may be compensated in damages, when they are the direct and immediate fruits of the contract, and must therefore have been stipulated for, and have been in the contemplation of the parties when it was made.

Applying this rule to the present case, why was not the loss

of the opportunity to compete for the premium (whatever may have been its value) an immediate consequence of the breach of the contract? Why was not that loss in contemplation of the parties? The company undertook to transport the box to the committee appointed to award the premium. The purpose of the contract was to secure to the plaintiff the privilege of competition. Certainly he must have had that in contemplation, and if the company were informed of the object of the transmission, the loss of this privilege was in view of both parties at the time they entered into the contract. But whether known or not by the company, the loss was an immediate result of their negligent breach. We do not now stop to inquire whether the defendants can be held liable for every consequence, even though immediate, which cannot reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it. Perhaps if the special circumstances under which the contract was made, and which occasioned special and unusual injury to attend its breach, were unknown to the party which broke it, they could not be held to make compensation for more than the amount of injury which generally results from the breach of such contracts in cases unattended by any special circumstances. We are inquiring now, however, only whether the loss of the opportunity by the plaintiff to exhibit his plans and specifications for competition was or was not too remote a consequence of a breach of contract to be taken into consideration by the jury. We cannot perceive why it was not the first consequence, proximate, immediate. Some doubt may be suggested arising out of the case of *Watson v. Ambergate, Nottingham, and Boston Railway Company*, 15 Jur. 448, a case in the queen's bench, England, the facts of which closely resemble those of the present case. There a prize had been offered for the best plan and models of a machine for loading colliers from barges, and plans and models for the competition were to be sent by a certain day. The plaintiff sent a plan and model, accordingly, by a railway, but through negligence it did not arrive at its destination until after the appointed day. The court appeared to be of opinion, though the point was not directly raised, that the proper measure of damages was the value of labor and materials expended in making the plan and model, and not the chance of obtaining the prize, the latter being too remote a ground for damages. Patteson, J., said that the right principle upon

which damages were recoverable was, that the goods were made for a special purpose, which had been defeated by the negligence of the defendants, and thus they had become useless.

It is difficult to see how the loss of the time and labor expended is a less remote consequence of the breach of the contract than is the loss of the opportunity to compete. Nor is it apparent how the value of the labor and materials expended upon the plan and model in that case, or the value of the time and labor devoted to the plans and specifications in this, can be regarded as any measure of the damages sustained in consequence of the non-delivery in time of the articles sent, unless the opportunity to compete for the prize be also taken into the estimation. If the chance for the prize is too remote, if it has no appreciable value, and cannot be considered by the jury, then what has been lost by the breach of the contract to deliver in time? Not the plans and specifications, for they are still in existence. The plaintiff has them. The time and labor would have been lost, without any breach of the contract, if the plaintiff's competition for the prize had proved unsuccessful. Their loss was not, therefore, necessarily a consequence of the breach of the contract. And if the time and labor were expended solely to secure a chance which was valueless, how can they have any value? They are certainly as remote and as contingent as is the chance itself. The fact appears to be that the opportunity to compete is what gives the time and labor expended any value, and if there can be any recovery at all, beyond nominal damages, as was held by the queen's bench, it must be because the loss of the chance for the prize, as it was then called, or, as I would term it, the loss of the opportunity to compete for the prize, is not too remote to be considered, and because its worth is capable of being measured.

But how is this loss to be estimated? Suppose the engagement of the company had been directly to afford to the plaintiff an opportunity to compete for the premium offered: could he, for the breach of such an engagement, have recovered more than nominal damages, without any proof that any actual injury had resulted from the breach? We think not. To entitle a plaintiff, in an action founded on a contract, to recover more than nominal damages for its breach, there must always be evidence that an actual, substantial loss or injury has been sustained, unless the contract itself furnishes a guide to the measurement of the damages; and

even when there is some such proof, but the amount is uncertain, courts have sometimes directed the jury to allow the smallest sum which would satisfy the proof: *Lawton v. Sweeney*, 8 Jur. 964; *Clunnes v. Pezzey*, 1 Campb. 8. A plaintiff claims compensation. The amount of that compensation is a part of his case. Whether in the present case this plaintiff sustained any actual injury depended upon the degree of probability there was that he would have been a successful competitor if the contract had not been broken. If his plans were entirely defective, if they were suited better for a bridge than an alms-house, it cannot be claimed that he was damaged. He introduced, however, no evidence to show that there was the least probability that the premium would have been awarded to him had his plans been submitted to the committee in time. On the contrary, the defendants proved that, doubtless, he must have failed. So far, then, from there being proof of actual damage, it was disproved. The court below, however, instructed the jury that there might be a recovery for more than nominal damages. They reversed the rule generally recognized, that the plaintiff must show a substantial, real injury, and cast upon the defendants the burden of proving that there was none. In this we think there was error. The second point of the defendants should have been affirmed unqualifiedly. Independent of the defendants' evidence, the plaintiff was not entitled to recover more than nominal damages, because he had not proved any actual damages, and the chance for the premium was contingent. Much more was this so upon the whole evidence in the cause.

The observations already made are also applicable, in part, to the answer of the court to the second point of the plaintiff, in which the same error is apparent.

We do not understand the court's answer to the plaintiff's third point as it is understood by the plaintiffs in error. The court could not have intended to instruct the jury that under any circumstances the plaintiff could recover for loss of a chance to secure reputation, or that the negligence of the defendants alone took away his chance of obtaining the premium. Had they done so, it would have been mistaken instruction.

The remaining assignment of error is not sustained.

Judgment reversed, and a *venire de novo* awarded.

DAMAGES CANNOT BE RECOVERED IN ACTION, AS GENERAL RULE, UNLESS THEY ARE NATURAL AND PROXIMATE CONSEQUENCE of the act or omission complained of: *Patch v. City of Covington*, 66 Am. Dec. 186, and cited cases in note to same 191; *Worcester v. Great Falls Mfg. Co.*, Id. 217, and citations thereto 219; *Heirn v. McCaughan*, Id. 588; extended note to *Griffin v. Colver*, 69 Id. 724.

LOSS OF PROFITS, WHEN MAY BE RECOVERED AS DAMAGES: *Griffin v. Colver*, 69 Am. Dec. 718, and extended note thereto discussing the subject, 724-727; cases cited in note to *Bagley v. Smith*, 61 Id. 761. Speculative, prospective, remote, and uncertain profits are never taken into account in estimating damages: See note to *Masterton v. Mayor of Brooklyn*, 42 Id. 49; *Coweta Falls Mfg. Co. v. Rogers*, 65 Id. 602; *Muldrow v. Norris*, 56 Id. 313. So damages will not be allowed for a conjectural loss of profits: Note to *Blanchard v. Ely*, 34 Id. 257. But profits which party would probably have made but for defendant's prevention may sometimes be estimated as damages: *Donnell v. Jones*, 52 Id. 194.

SPECIAL DAMAGE CANNOT BE PROVED UNLESS ALLEGED IN DECLARATION: *Donnell v. Jones*, 48 Am. Dec. 59; *Heirn v. McCaughan*, 66 Id. 588. But special damages are not required to be shown by plaintiff in order that he may recover upon a contract, when he has proved a breach thereof; he is entitled to at least nominal damages: *Heichew v. Hamilton*, 61 Id. 122.

THE PRINCIPAL CASE WAS CITED in each of the following authorities and to the point stated: In every case of damages for a breach of contract, the loss or injury for which damages are allowable must be the proximate consequence of the injury. A remote or possible injury is not a sufficient ground for compensation: *Fessler v. Love*, 48 Pa. St. 410; *Wolf v. Studebaker*, 65 Id. 463; *Pittsburg Coal Co. v. Foster*, 59 Id. 369. But profits may be recovered where they are part and parcel of the contract itself, entering into and constituting a portion of its very elements; something stipulated for, the right to the enjoyment of which is just as clear and plain as the right to the enjoyment of any other stipulation: *Pennypacker v. Jones*, 106 Id. 242. There is no measure for remote or possible losses but the loss of profits or advantages, which must have resulted from a fulfillment of the contract may be compensated in damages, when they are the direct and immediate fruits of the contract, and must, therefore, have been stipulated for, and have been in the contemplation of the parties when it was made: *Pittsburg Coal Co. v. Foster*, 59 Id. 369; *Fessler v. Love*, 48 Id. 410. In the case last cited, it was held that the measure of damages for the breach of a contract to deliver logs is the difference between the contract price at the time and place where they were to be delivered and the market price at the same time and place; and that defendant's offer to prove his damages as a manufacturer of lumber by reason of the non-fulfillment of the contract, and also because of his mill standing idle for the want of logs on which to operate, was laying too broad a ground for damages, and could not be shown unless such results were in contemplation of the contracting parties at the time of the contract. The principal case was cited to the point that such damages, unless in view of the parties at the time of contracting, must be regarded as wanting in the directness or proximity required by settled authority.

BROTHERS v. McCURDY.

[36 PENNSYLVANIA STATE, 407.]

CONDITION, IN RESTRAINT OF ALIENATION, ANNEXED TO ESTATE IN FEE-SIMPLE, IS TO BE STRICTLY CONSTRUED, as it is against the general policy of the law.

"OFFER" OR "ATTEMPT" TO ALIEN CANNOT BE RESTRAINED. Such a prohibition is too vague and uncertain; and therefore void, for an offer is not an issuable fact.

"ACTUAL" ALIENATION IS NOT WITHIN CONDITION AGAINST "OFFER" TO ALIEN.

CONDITION ANNEXED TO DEVISE IN FEE THAT DEVISEE SHALL NOT "OFFER" TO ALIEN FOR PARTICULAR PURPOSE IS VOID for uncertainty; and the devisee will take an indefeasible estate.

EJECTMENT by William Brothers and other heirs of Joseph Brothers, deceased, against James McCurdy, Ellen E. McCurdy, and Eli Price, for a lot of ground on Third street, in Lewiston. Joseph Brothers, through whom the plaintiffs claimed, originally owned the premises. In 1840, he devised the same by will to his son, James Brothers, subject, however, to the condition that James should not sell the lot to any person for the purpose of making brick or carrying on the brick-making business. More especially was it the testator's will that James should not sell the lot to Lotz and Beasley; and declared that his bequest of the lot should be void, "in case of an offered sale," contrary to his will, by his son James; and that the lot was to be held in common among his other heirs, should James "offer to sell," etc. Lotz and Beasley were the only brick-makers in Lewiston in the life-time of Joseph Brothers. They owned the adjoining lot, and used it in their business. They had often tried to buy the lot of Joseph Brothers, but the latter refused to sell it to them. But after his death James did offer to sell the lot to them, and Daniel Fichthorn advised them to purchase it, saying that the condition in the will was void. In 1840, James sold and conveyed the lot to Fichthorn; and recited in his deed that it had been devised to him by his father, Joseph Brothers, subject to certain restrictions in his will. Fichthorn and wife, in 1857, conveyed the premises to Ellen E. McCurdy, the wife of James McCurdy. Verdict and judgment for the defendants.

Elder and Woods, for the defendants in error.

By Court, READ, J. Conditions in restraint of alienation upon estates in fee-simple should be strictly construed, being against the general policy of the law. In this case, it is not

the sale, but the offer to sell, which forms the breach upon which the estate is to pass from James to the other heirs of the testator. "My bequeath of said lot to be void in case of an offered sale, contrary to my will, by my son James; and the said lot to be held in common among my other heirs should my son James offer to sell as aforesaid," says the will.

In *Pierce v. Win*, 1 Vent. 321, where there was a devise to one, and to the heirs male of his body, with a proviso that if he does attempt to alien, then immediately his estate should cease and another should enter, "the court held the condition void; for a man cannot be restrained from an attempt to a lien, for *non constat* what shall be adjudged an attempt, and how can it be tried? And when the express words are so, there shall not be made another sort of condition than the will imports." The same doctrine is laid down in *Mildmay's Case*, 6 Co. 42; *Corbet's Case*, 1 Id. 85; and by Rogers, *arguendo*, in *Ware v. Cann*, 10 Barn. & Cress. 435, where he says: "Now, although a condition prohibiting an act be good, yet the prohibition of an offer or attempt is too vague and uncertain, and therefore void, for an offer is not an issuable fact: *Pierce v. Win*, 1 Vent. 321; S. C., Pollexfen, 435; and according to that case, where the condition is against the offer to alien, actual alienation is not within the condition;" and the court held this to be the law.

The condition in restraint in the present case is therefore void, and James took an indefeasible estate in fee-simple, which is now vested in the defendant Ellen E. McCurdy. The judgment is therefore affirmed, although for a different reason than that assigned by the court below.

Judgment affirmed.

RESTRAINTS ON ALIENATION are discussed in *De Peyster v. Michael*, 57 Am. Dec. 470, and extended note thereto 488-499. As to validity of condition in devise restraining alienation, see note to *Bramhall v. Ferris*, 67 Id. 119.

CONDITIONS AGAINST ALIENATION ARE STRICTLY CONSTRUED: See note to *De Peyster v. Michael*, 57 Am. Dec. 496.

AS TO "ATTEMPTING" OR "OFFERING" TO ALIENATE: See note to *De Peyster v. Michael*, 57 Am. Dec. 496, where such provisions, it is said, are ordinarily held void for uncertainty, if not aided by other words.

LOUDON SAVINGS FUND SOCIETY v. HAGERSTOWN SAVINGS BANK.

[36 PENNSYLVANIA STATE, 493.]

FACT AND SCOPE OF AGENCY CREATED AND PROVED BY WRITING ARE QUESTIONS OF LAW, and are properly decided by the court.

FACT AND SCOPE OF AGENCY NOT CREATED BY WRITING, but implied from the conduct of the principal and proved by witnesses, are questions of fact, and should be left to the jury.

GENERAL AGENT IS ONE HAVING AUTHORITY TO TRANSACT ALL OF ANOTHER'S BUSINESS of a particular kind; and the employer is bound by all the agent's acts done within the scope of his employment.

SPECIAL AGENT IS ONE EMPLOYED ABOUT SPECIFIC ACTS ONLY; and the employer is not bound by the agent's action unless the latter's authority is strictly pursued.

PARTNER IS GENERAL AGENT FOR HIS FIRM, but only within the scope of its business.

CERTIFICATE OF DEPOSIT IS NOT NEGOTIABLE INSTRUMENT, such as will enable an indorsee to maintain an action on it in his own name.

ASSIGNOR OF CERTIFICATE OF DEPOSIT NOT NEGOTIABLE IS NOT COMPETENT WITNESS to support it in an action by the transferee.

DEFENDANT MAY, IF WILLING, BE EXAMINED AS WITNESS for plaintiff in an action of *indebitatus assumpsit*.

ASSUMPSIT by the Hagerstown Savings Bank against William McGrath and forty-two other persons doing business in the name of the Loudon Savings Fund Society. The opinion sufficiently states the facts.

Reilly and Sharpe, for the plaintiffs in error.

McLelland and McClure, for the defendants in error.

By Court, **WOODWARD, J.** The Hagerstown Savings Bank brought this action of *assumpsit* against William McGrath and his numerous co-defendants, as partners trading and doing business under the name and style of the Loudon Savings Fund Society. The first count in the plaintiff's *narr.* is founded upon a "certain writing obligatory, commonly called a certificate of deposit, for the sum of five thousand dollars, signed by H. Easton, treasurer of said Loudon Savings Fund Society (who had full power conferred upon him to do such act), and then and there delivered said certificate of deposit to said plaintiff, and thereby promised to pay said plaintiff said sum of five thousand dollars, six months after the date thereof, with interest at six per cent." The second count is upon a certificate for a deposit of like sum, made by H. Easton, and by him indorsed, but delivered by the defendants to the plaintiff. Then follow the common money counts.

The copy of the certificate of deposit shows that it was issued on the first of January, 1857, by H. Easton, treasurer, to himself for five thousand dollars, payable to his order six months after date, with interest at six per cent, and by him indorsed in blank.

Besides all the general pleas, the defendants pleaded specially: 1. That the said writing obligatory was not their act or deed; 2. That Hezekiah Easton had no power or authority, as treasurer of the Loudon Association or otherwise, to sign or indorse the certificate, and that he issued it fraudulently and corruptly, without the knowledge or authority of the defendants, of all which the plaintiff had knowledge when the certificate came into their possession; 3. That Hezekiah Easton was not treasurer of the Loudon Savings Fund Society when the said writing was made; 4. That the defendants did not make said paper, nor deliver the same to the plaintiff; 5. That Easton did not deposit the five thousand dollars mentioned in said certificate, but was largely indebted to said society; 6. That the plaintiff is not a *bona fide* holder of said certificate for value; 7. That the proceeds of said certificate did not go into the business of the defendants, but were appropriated by said Easton, and that the plaintiff knew such use of the funds was intended. By means of these numerous pleas, and the points submitted on the one side and the other, the case was presented in every possible aspect.

On the trial of the cause, the learned judge directed the jury to return a verdict for the amount of the plaintiff's claim, and declined to submit any question of fact for their decision. To the admission of evidence, and the refusal of the court to give instructions prayed for, sixteen errors are assigned, which I do not propose to consider in consecutive order, though all that is material in them shall be noticed.

It is apparent that the great question raised upon the record had reference to the character and extent of Easton's authority as the agent of the defendants. The party who avails himself of the act of an agent must, in order to charge the principal, prove the authority under which the act is done. If the authority be created by power of attorney or other writing, the instrument itself must in general be produced; and since the construction of writings belongs to the court, and not to the jury, the fact and scope of the agency are, in such cases, questions of law, and are properly decided by the judge. But the authority may be by parol, or it may be implied from the

conduct of the employer in sanctioning the credit given to a person acting in his name. And in many cases the acts of an agent, though not in conformity to his authority, may yet be binding upon his employer, who is left, in such cases, to seek his remedy against his agent. Whether an employer be or be not bound by such acts as are not conformable to the commission given by him, depends principally upon the authority being general or special. By a general agent is understood, not merely a person substituted in the place of another, for transacting all manner of business, but a person whom a man puts in his place to transact all his business of a particular kind, as to buy and sell certain kinds of wares, to negotiate certain contracts, and the like. An authority of this kind empowers the agent to bind his employer by all acts within the scope of his employment, and that power cannot be limited by any private order or restriction, not known to the party dealing with the agent. A special agent is one who is employed about one specific act, or certain specific acts only, and he does not bind his employer unless his authority be strictly pursued: Paley on Agency, 199 et seq. "A general authority," said Lord Ellenborough, in *Whitehead v. Tuckett*, 15 East, 408. "does not import an unqualified one. but that which is derived from a multitude of instances; whereas a particular authority is confined to an individual instance." And in all instances where the authority, whether general or special, is to be implied from the conduct of the principal, or where the medium of proof of agency is *per testes*, the jury are to judge of the credibility of witnesses and of the implications to be made from their testimony.

As the plaintiff here did not produce any written evidence of Easton's agency, it was the duty of the court to inform the jury what constitutes agency, express or implied, special, or general, and to refer to them the questions: 1. Whether the evidence satisfied them that Easton was either the general or special agent of the defendants; and 2. Whether the issuing of the certificate in suit was within the scope of his authority: *Peries v. Aycinena*, 3 Watts & S. 79; *Jordan v. Stewart*, 23 Pa. St. 247; *Seiple v. Irwin*, 30 Id. 518; *Williams v. Getty*, 81 Id. 461 [72 Am. Dec. 757].

Or, if it was not a case of strict agency, if Easton acted without any authority in issuing the certificate, or transcended such as had been delegated to him, the question of ratification by the defendants was also a mixed question of law and fact.

What would in law amount to ratification was for the court; whether such proofs were found in the case was for the jury. Such adoptive authority relates back to the time of the original transaction, and is deemed, in law, the same to all purposes as if it had been given before: *Lawrence v. Taylor*, 5 Hill, 107-113; and see 1 Livermore on Principal and Agent, 44-50; *Philadelphia W. & B. Railroad Company v. Cowell*, 28 Pa. St. 337 [70 Am. Dec. 128].

The main argument of counsel in support of the court's entire withdrawal of the case from the jury rests on the law of partnership. Easton was a partner in business with the defendants, the acting partner to whom the conduct of the business of the defendants had been almost wholly committed for a long time; and hence it is correctly inferred that the saving fund society so accredited him to the world as to bind his copartners, by his dealings with innocent parties within the scope of the business of the partnership.

The authorities, as may be seen by consulting Gow, Story, Collyer, or any other standard work on partnership, abundantly sustain the proposition that each partner is, in contemplation of law, the general agent of the partnership. "When a partnership is formed for a particular purpose," said Chief Justice Marshall, in *Winship v. Bank of United States*, 5 Pet. 561, "it is understood to be, in itself, a grant of power to the acting members of the company to transact its business in the usual way. If that business be to buy and sell, then the individual buys and sells for the company, and every person with whom he trades in the way of its business has a right to consider him the company, whoever may compose it. The articles of copartnership are, perhaps, never published. They are rarely, if ever, seen, except by the partners themselves. The stipulations they may contain are to regulate the conduct and rights of the parties, as between themselves. The trading world, with whom the company is in perpetual intercourse, cannot individually examine these articles, but must trust to the general powers contained in all partnerships. The acting parties are identified with the company, and have power to conduct its usual business in the usual way."

These observations were made in a case where the several defendants were engaged in the soap and candle business, and they were all held liable on notes indorsed by Winship in the firm name, notwithstanding the restrictions imposed on him by the articles under which he was acting, and notwithstand-

ing the money, or some of it, was misapplied to his own purposes. This case is a strong illustration of the commercial principles which permeate the contract of partnership. In strictness, it is applicable only to commercial transactions.

The general principles stated by the chief justice in the same case are applicable to all partnerships, whether commercial or not in their pursuits. He said: "No man can be pledged but by himself. If he is to be bound by another, that other must derive authority from him. The power of an agent is limited by the authority given him; and if he transcends that authority, the act cannot affect his principal; he acts no longer as agent. The same principle applies to partners. One binds the others so far only as he is the agent of the others."

Now, it is material to observe that in the case in hand the learned judge withdrew the facts from the jury, on the assumption that Easton's act was within the scope of the business of the partnership of which he was a member; that he was conducting "its usual business in the usual way." And the argument of the learned counsel rests on the same assumption.

But what right had either court or counsel to assume that point? Surely it was, in its nature, a question of fact, and therefore belonged to the jury to decide, unless it might be legitimately assumed. It was properly assumed, we are told, because the evidence was all one way. If this were sound in point of doctrine, it is not correct in fact. On the contrary, the plaintiff's counsel may find it difficult to persuade a jury that Easton was doing the company's usual business in the usual way when he issued the certificate in suit. If, to ascertain what was their proper business, the constitution be appealed to, that establishes a saving fund society "for the purpose of securing to the prudent and industrious a safe and profitable investment for such small sums of money as may be saved from their earnings." The joint funds were to consist of deposits of money, and such public stocks and other securities as said deposits may be invested in, and the profits of such deposits and investments. Such dividends as would not impair the deposits, or otherwise injuriously affect the interests of the institution, were to be made once every six months, and weekly depositors were to share in the dividends. By article 12, the funds were limited to fifty thousand dollars, and the property in which these were invested was to be alone responsible for the debts and engagements of the society. And no person to whom the society should become indebted should, on any pretense what-

ever, have recourse against the separate property of any member, further than should be necessary to compel the faithful application of the funds of the society to the purposes to which they were by the constitution made liable. And it was expressly declared that no engagement could be legally made in the name or on behalf of the society, nor any valid check, draft, or order be given or passed thereon, unless the same should contain a limitation or restriction to that effect.

The by-laws contain a variety of provisions for the regulation of the society's business, and legalize deposits even of twelve and one half cents; but no interest was to be allowed on deposits until they amounted to five dollars. Resolutions were adopted, in pursuance of the by-laws, in 1838, 1847, 1850, and 1856, fixing and changing the rates of interest to be paid on deposits, according to time and amount, the highest rate of which was not to exceed five per cent per annum.

I do not find a syllable in these documents which looked to the borrowing of money, or to any business in which loans would be required. They were given in evidence by the plaintiffs, in connection with the certificate of deposit, to show that the certificate was authorized. The third article of the constitution empowers the treasurer to receive all moneys of the society, and to disburse them under regulations of the president and directors; by the second section of the by-laws, every depositor was to be furnished with a book containing a duplicate of his or her account, in which deposits were to be entered by the secretary or treasurer, which book was to contain such extracts from the constitution and by-laws as would sufficiently define the rights of such depositor and of those who might claim under him; and by the resolutions, the treasurer was to allow the prescribed rates of interest on special deposits. Certificates of deposit do not seem to be provided for, and certainly fictitious certificates, representing no deposits, but created only to borrow money upon, are nowhere contemplated.

By Easton himself, however, the plaintiff proved that he had authority to issue certificates for special deposits; and that he frequently issued certificates without consulting the board. A long list of certificates also was exhibited, issued by William Baker, a former treasurer, to himself; some of them for the use of third persons, others to himself as guardian, and others to himself individually. From this evidence, a jury might fairly have inferred that had the Hagerstown Bank deposited five thousand dollars with the society, Easton was

authorized to issue a certificate therefor in his own name, and to deliver it, by indorsement or otherwise, to the Hagerstown Bank. But let it be observed that this evidence tended to prove an authority only to issue certificates for deposits. Easton swore that he had no authority to borrow money, except what was conferred by the constitution, by-laws, and resolutions of the board of directors; and that there never was any resolution of the board authorizing him to borrow money from the Hagerstown Bank. Easton was treasurer from the first of January, 1853, until July, 1857. His transactions with the Hagerstown Bank were as follows: On the fourteenth of June, 1854, the bank deposited three thousand dollars, and took Easton's certificate of deposit therefor at four per cent. The funds were obtained for circulation, and were to be replaced by eastern exchanges. In July, 1854, two thousand dollars were borrowed on the same terms, and repaid in October, 1854. On the eighth of March, 1855, seven thousand dollars were borrowed in the same manner. This loan was made before the three-thousand-dollar certificate fell due. July, 1855, the two certificates for three thousand dollars and seven thousand dollars were taken up, and a new one taken for ten thousand dollars. In June, 1856, five thousand dollars were paid, and the certificate in suit was taken. The change in the form of the certificate and in the rate of interest was made because the society failed to furnish exchange as agreed.

The first of these certificates was the only one entered on the books of the society. Easton says the directors had no knowledge of the change in the form of the certificate, nor did they assent to it; that the money was got for the purpose of circulating the Hagerstown Savings Bank money; that he was a stockholder of the bank, but no agent; that he was requested by the bank to get the money into circulation; that there was no verbal or written resolution of the directors authorizing him to get this money, and that they never ratified the act.

I enter into no minute estimates of the weight or value of this evidence. This is not the time or place for doing so. I have adverted to it, not for the purpose of saying that it proved or disproved the liability of the defendants, but for the purpose of showing that it ought to have gone to the jury, instead of being made the ground of a judicial presumption in regard to the main point in the cause. Applying the strictest commercial rules of partnership law to the defendants, it is impossible for any judge to say, with this evidence before him, that

the circulation of the currency of a neighboring bank was one of the purposes of their institution. But if they were originally a mere saving fund society, intending to trade on nothing but actual deposits, they might still have changed their purpose, and allowed their acting partner to negotiate loans in their name at four per cent, for the profit of relending them at six per cent. Did they do so? Did they know what he is doing? Had they the means of knowing? Or, when the original deposit of three thousand dollars was repaid to the Hagerstown Bank, did the saving fund close that account? and was the subsequent loan of ten thousand dollars made to Easton for his own use at the instance of the bank, and with full knowledge that he had no authority from the saving fund to borrow at six per cent? Had the saving fund any knowledge of this loan, or means of knowledge?

These are questions that go directly to the point, whether Easton was acting within the scope of the partnership; and yet that is the point assumed by the court.

If the saving fund had indeed taken up this business of borrowing money for circulation, and the bank lent their money to Easton in good faith for this purpose, they are liable for it, even though Easton misapplied it to his own use. But if he was not acting in pursuit of a partnership purpose, or if the Hagerstown Bank was privy to the fraud he was practicing on his principals, they are not liable to the bank: *Fisher v. Tayler*, 2 Hare, 218; *Clay v. Cottrell*, 18 Pa. St. 412; *Smith v. Insurance Company*, 24 Id. 320. Because the case was not submitted to the jury on these principles it must go back.

But then how are the plaintiffs to recover in their own name on the certificate? It is not a negotiable instrument, nor is it legally assigned. On its face it is payable in currency to H. Easton, or order, and our opinion is that a transferee of such an instrument can only sue upon it in Easton's name to the use of the holder.

The answer to this objection was, that Easton could not be both plaintiff and defendant. Certainly not with a beneficial interest in both characters; but as a mere trustee holding only the legal title to the chose in action, he could not prevent his name being used as a plaintiff by the party equitably entitled.

The consequence of this ruling is, to leave the plaintiffs' case dependent on their money counts. I agree that if the saving fund have got five thousand dollars of the bank's money, which cannot, in good conscience, be retained, the

bank may recover it in their own name on the money counts. But then this brings us right back to the questions of fact indicated above, whether this money was indeed loaned to the saving fund? These questions must be met before a jury before the cause can be properly decided.

If the suit were to be tried on the first two counts in the declaration, we should be obliged to say that Easton would not be a competent witness. If *Post v. Avery*, 5 Watts & S. 509, and the numerous cases that have followed it, be law, he would be clearly incompetent to support the certificate of deposit in the hands of the transferee.

But how stands this question if the case be tried on the money counts only? The certificate would not be in evidence at all, and Easton, being a defendant, would, if called by the plaintiff, be a witness against his interest, and therefore competent. As the cause was tried, we think he was improperly admitted. As it will be tried on the common counts, we see no objection to his competency if he is willing to testify.

We think there was no error in admitting the certificates of deposit issued by William Baker. They exhibited the mode of doing business on the part of the defendants, and showed there was nothing extraordinary or unprecedented in a treasurer issuing certificates to himself. They did not tend, however, to justify the practice of issuing certificates where no deposits had been made. Mr. Baker is not to be presumed guilty of so vicious a habit; and as there was no supplementary evidence to show that these certificates had been issued in the reckless manner practiced by Easton, the evidence did not justify the conduct of the latter in the point which most needed support.

The acts of assembly seem to justify the action of the court in striking the names of certain defendants off the record. This is all which we deem it necessary or proper to say of this cause at present.

The judgment is reversed, and a *venire facias de novo* is awarded.

GENERAL AGENT IS ONE EMPLOYED to transact all the principal's business of a particular kind: *Loddell v. Baker*, 35 Am. Dec. 358. A general selling agent has no authority to depart from the usual manner of accomplishing what he is employed to effect: *Upton v. Suffolk Co. Mills*, 59 Id. 163. An agent has only such powers as are expressly given or are necessary and proper for carrying out those expressly given: *Wood v. Goodridge*, 52 Id. 771. But a general or special agency impliedly includes all powers necessary,

proper, or usual to accomplish the purposes for which the authority was created: *Benjamin v. Benjamin*, 39 Id. 384.

ACTS OF AGENT BIND PRINCIPAL, WHERE AGENCY IS GENERAL IN ITS CHARACTER: *Rossiter v. Rossiter*, 24 Am. Dec. 62, and note 65; *Williams v. Getty*, 72 Id. 757, and note 760; *Wood v. McCain*, 42 Id. 612; *Towle v. Leavitt*, 55 Id. 195.

SPECIAL AGENT CAN BIND PRINCIPAL ONLY TO EXTENT OF AUTHORITY conferred by the latter: *Carmichael v. Buck*, 70 Am. Dec. 226; *Rossiter v. Rossiter*, 24 Id. 62, and note 65; *Towle v. Leavitt*, 55 Id. 195; *Pursley v. Morrison*, 63 Id. 424.

PARTNER IS GENERAL AGENT OF HIS CO-PARTNERS: *Western Stage Co. v. Walker*, 65 Am. Dec. 789.

CERTIFICATE OF DEPOSIT AS NEGOTIABLE INSTRUMENT: *O'Neill v. Bradford*, 42 Am. Dec. 574, and extended note thereto 576-579; *Lesott v. Palmer*, 51 Id. 333; *Welton v. Adams*, 60 Id. 579, and note 581; *Beam v. Briggs*, 63 Id. 464; note to *McMillan v. Richards*, 70 Id. 675.

KAY v. SCATES.

[37 PENNSYLVANIA STATE, 31.]

MERE DRY TRUST WILL NOT BE SUSTAINED when persons equitably entitled to any property take absolutely the entire beneficial interest, and the trustee has no duty to perform; unless it be a special trust intended to accomplish some object, as to preserve contingent remainders, protect property for the sole and separate use of a married woman, or from the creditors of the *cestui que trust*.

TRUSTS WILL NOT BE SUSTAINED, BUT WILL BE TREATED AS EXECUTED, and the legal estate as vested in the *cestui que trust*, where the persons named as trustees have no duties to perform which require the seisin or possession of the estate to be in them, and the persons for whose use the trust was created are *ad jure*.

LIMITATION IN WILL TO ONE FOR LIFE with a power of appointment in favor of the issue of his body, and in default of such appointment, to such issue, and if he die leaving no issue of his body, then over, creates an estate-tail in the first taker.

IN DEVISE OF LANDS, USE OF WORDS "LEAVING NO ISSUE OF HIS BODY" indicates an indefinite failure of issue.

WORD "ISSUE" IN WILL is primarily word of limitation.

DEVISE BY TESTATOR OF ONE THIRD OF HIS ESTATE to each of his three children for life, with power of appointment in favor of the issue of his or her body, in default thereof, to said issue, and in default of any issue, to the heirs of the testator, directing the same to be held in trust by his executors, who were directed to sell and invest the property in real estate, and allow the children, from their income therefrom, such money for their support and education as they may think proper, and also, on their attaining the age of twenty-five, to pay them, respectively, during their natural lives, in quarterly installments, the income of the said real estate for their respective benefit, would, on the children's attaining respectively the age of twenty-five, create a complete estate-tail in each, clear of the trust, which, by the Pennsylvania act of 1855, would be converted into an estate in fee-simple.

TRUST WILL NOT BE SUSTAINED ON GROUND THAT IT IS FOR SOLE AND SEPARATE USE of a woman, if she was unmarried when the will took effect, and there was at the time no marriage in immediate contemplation.

TRUST WILL NOT BE CONSIDERED EXECUTED until the time at which the full beneficial enjoyment of the interest devised shall vest.

WHEN NOMINAL TRUST OPERATES TO CLOUD TITLE AND EMBARRASS ALIENATION, a conveyance will be decreed in accordance with the practice of courts of chancery.

BILL in equity by J. Alfred Kay, William H. Furness, jun., and Hannah, his wife (formerly Hannah Kay), and Mary Kay, against Scates and Cope, executors of James Kay, deceased. By his will, James Kay devised one third of his estate to each of the complainants for life, with a power of appointment in favor of the issue of their bodies, and in default of such appointment, then to such issue, and in default of any issue, to testator's heirs at law by consanguinity, directing the same to be held in trust by the defendants. The object of the trust, in regard to Hannah Furness and Mary Kay, purported to be to prevent their interest in the estate from becoming liable for any engagements or debts, or subject to the control of any husband they might have or take; and it was directed, in the case of each of the complainants, that he or she should be entitled to the income of the estate so devised on attaining the age of twenty-six years. J. Alfred Kay is alleged in the bill to be twenty-five years of age, Hannah Furness twenty-two, and Mary Kay twenty-one. The bill prays for a decree to compel defendants to convey the legal title to the aforesaid real estate to the complainants in equal portions.

Hopper, for the complainants.

Pancoast, for the respondents.

By Court, **STRONG, J.** If the estate devised for life to J. Alfred Kay and the other complainants be only equitable, while the remainder given to the issue of the bodies of each is legal, the prayer of the bill must be denied. There is, then, no ground for the application of the rule in *Shelley's Case*. The first question, therefore, presented by the record is whether the legal estate is vested in the defendants, who are the trustees named in the will of the testator, or whether it has passed to the beneficial devisees. The will directs that the trustees shall invest the property given in real estate in their own names, which has been done. It directs that the prop-

erty shall be kept perpetually and sufficiently insured, and that, on the attainment of the age of twenty-five years by James Alfred Kay, the trustees shall pay to him, during his life, in quarterly installments, the income of the said real estate purchased for his benefit; and it declares that his receipt, and his receipt alone, shall be their only sufficient discharge therefor. James Alfred Kay, one of the complainants, has attained the age of twenty-five. As to him, the discretion given to the defendants to allow to each of the complainants, for his or her income, such money for his or her support and education as they may think proper and expedient, and the direction to invest the surplus for his benefit, have expired. The duty of the trustees now, therefore, is to pay over, quarterly, the whole income, taking his receipt. Have they, then, any duty imposed upon them which requires that they should continue invested with the legal estate? If the case were to be decided according to the doctrine of the English courts, it cannot be doubted that they have. There the rule appears to be well established, that when there is a gift of real estate to trustee, with a direction to convey, or to pay the rents and profits to certain persons, or to receive the rents and apply them for the maintenance of an individual during his life, or to pay an annuity out of the rents during his life, the seisin or possession of the legal estate is requisite for the due performance of the duty imposed upon the trustees, and consequently that the persons to whom the use is subsequently given take only an equitable estate.

Such interests are not held regarded as mere dry trusts, to be disregarded, and considered executed in the person to whom the beneficial interest is given. To sustain a dry trust, there must have been some special lawful trust expressed, but not so where the trustee has active duties to perform. From the case of *Jones and Lord Say and Seal*, 1 Eq. Cas. Abr. 383, to the present time it has been held that there is a distinction between a devise to trustees to pay the rents, issues, and profits, and a devise to them to permit the beneficial donee to receive such rents, or generally in trust for the beneficial donee. Hill, in his treatise on trustees, has collected many cases in which the doctrine has been asserted (p. 232). Jarman also has collected a large number, from which he deduces the rule that where property is devised to A and his heirs, the question whether A does or does not take the legal estate depends chiefly on the fact whether the testator has imposed upon him

any duty or trust, the performance of which requires that the estate should be vested in him; and it has been held, and is still held, that though nothing be required of the trustee but to pay over the rents, that is sufficient. Thus in *Leicester v. Biggs*, 2 Taunt. 109, a distinction was drawn between a devise to a trustee to pay over the rents, and a devise to permit the *cestui que trust* to receive them; the legal estate in the former case being held to be in the trustee, and in the latter in the beneficial owner. In *Gratrex v. Homfray*, 6 Ad. & El. 206, there was a devise to the use, that certain persons named should and might take and receive the rents, issues, and profits, and pay the same to the testator's son for and during his natural life, and from and after the decease of the son, the testator devised the premises to the heirs of the body of the son, with remainders over in default of such heirs of the body. It was held that a legal estate passed to the persons empowered to receive and pay the rents during the life of the son. Lord Denman said the case fell within the numerous class where it has been held that a devise to trustees to pay over the rents vests the estate in such trustees. That the devise is not directly to the trustees, but to the use and intent that they may receive, etc., appears to us to make no difference, nor the absence of a devise to trustees to preserve contingent remainders. He added, "it was observed that the will required nothing to be done by the trustees, and it is true nothing is to be done but paying; but this has been held to be sufficient, and must be taken to be the present law." And even where a trust to permit and suffer the testator's wife to receive the rents during her widowhood was followed by a direction that her receipts with the approbation of any one of the trustees should be good and valid, it was held that the legal estate was vested in the trustees, and this because the testator contemplated that they should approve the receipts given by the *cestui que trust*.

Neither in England nor in this state will a mere dry trust be sustained, when the person equitably entitled to any property takes absolutely the entire beneficial interest, and the trustee has no duty to perform, unless it be a special trust, intended to accomplish some object, such as to preserve contingent remainders, or to protect property for the sole and separate use of a married woman, or from the creditors of the *cestui que trust*. But some recent Pennsylvania cases have held that our law strikes down trusts which are valid in England, treats them as executed, and regards the legal estate as vested in

the *cestui que trust*. Of this class, *Kuhn v. Newman*, 26 Pa. St. 227, is the leading one, and perhaps the first. *Rush v. Lewis*, 21 Id. 72, and *Steacy v. Rice*, 27 Id. 75 [67 Am. Dec. 447], are in perfect harmony with the decisions in the mother country. In the first of these there was a devise to executors in trust to pay the rents, issues, and profits to the testator's daughter, during her life, for her sole and separate use, and after her death for the use of such persons as she might appoint by will, and in default of appointment, to and for the use of her children. After the death of the daughter, the legal estate was held to be vested in her appointee. Here, after the termination of the special trust, to pay the rents to the sole and separate use of the married daughter, there were no duties for the trustees to perform, and the purposes of the trust were satisfied. Then the law struck it down. Indeed, it was intimated that the direction to pay the rents, issues, and profits to the tenant for life alone sustained the legal title in the trustees till her death, though the intimation overlooked the fact that there was a special purpose in the creation of the trust, to wit, the preservation of the income for the separate use of a married woman. *Steacy v. Rice*, *supra*, was very similar. There also the legal estate was not declared vested in the *cestui que trust* until the special trust had terminated, and the trustees had ceased to have any active duties to perform.

But *Kuhn v. Newman*, *supra*, advances on the doctrine of these cases. There, the trust was to hold for the separate use of the *feme covert* to permit her to take, receive, enjoy, expend, and dispose of the rents, issues, and profits, during her natural life, and after her death, in trust to educate, maintain, and support her children until their arrival, respectively, at the age of twenty-one years, then in trust for the sole and separate use of such children, subject as to the income thereof to their own free and absolute disposal. Until the children arrived at the age of twenty-one, the trustees were required to educate, maintain, and support them; after that time they had no duties to perform; and even in England, the legal estate would then have vested in them. But the court held that it so vested, even before their arrival at the age of twenty-one, notwithstanding the duty imposed upon the trustees. They declared that "our common law takes a higher position than English common law or English equity; that in relation to titles to lands, it does so by adopting the forms of both as legal forms, and treating all complete equitable titles as com-

plete legal ones, where the persons named as trustees have no duty to perform that requires the seisin and possession to be in them; and then our common law enforces the trust as a legal estate," "even those uses that were not executed by the statute (of uses); for example, those that are limited against the rules of the common law: *Chudleigh's Case*, 1 Co. 129; a use limited upon a use, a use of chattles real, and a trust to receive rents and pay them to another: 2 Bla. Com. 335; all these are executed by one principal." The case, in effect, denies the possibility of creating in this estate any other than technically special trusts. Thus it is said that trusts properly so called are uses that our law does not execute as legal estates, because of circumstances that take them out of the ordinary course of legal administration and place them under a special guardianship of the court; but this is not generally allowed in favor of individual persons who have full competency to act in their own right. A fee-simple in them is treated as such, whether assured in a legal or equitable form. In other words, persons who are *sui juris* men or women must be satisfied with the ordinary remedies and protection of the law. And finally, it is held that a trust to educate and maintain children until they arrive at age does not furnish a legitimate reason for preserving the trust from being executed in the beneficiary. The case was decided by a unanimous court. I understand it as denying the possible existence of any such trust as the testator in this case has attempted to set up in favor of the complainants. It declares them to be the holders of the legal estate. *Bush's Appeal*, 33 Pa. St. 85, substantially reasserts the doctrine of *Kuhn v. Newman*, 26 Id. 227. There, the *cestui que trust* was a *feme covert*, it is true, but the gift was not declared to be for her separate use. The trustee was ordered to receive the legacy, put it at interest, and pay the interest yearly to the testator's daughter during her natural life, and the principal, after her death, to her heirs, share and share alike, in equal parts. The trustee's duty, it will be observed, was to invest and pay the interest yearly during life.

This court held that no trust existed after the death of her husband. The actual duties imposed upon the trustee were not sufficient to keep alive the trust, and it was therefore treated as executed in the *cestui que trust*. *Kuhn v. Newman*, *supra*, and *Bush's Appeal*, *supra*, govern the present case. The complainants are all *sui juris*. The duties imposed upon the respondents, as trustees, are neither greater, no more require

the seisin to remain in them, than the duties of the trustees in those cases. Nor is the nature of the duties different. The trustees are to pay the income quarterly, and are to be discharged only by the receipts of the complainants. The entire beneficial interest is in the *cestuis que trust*. It is true that two of the complainants have not yet arrived at the age of twenty-five, and until then the testator has postponed their full enjoyment of the income of the property. Until then a discretion is given to the trustees to determine what amount they shall receive. The full right to a present beneficial enjoyment is not yet theirs. But when they shall reach that age, they will stand in the same position with their brother, the other complainant. It need not be said that a trust is to be sustained because the gift is for their sole and separate use. They were unmarried when the will took effect, and no marriage was immediately contemplated: *Smith v. Starr*, 3 Whart. 67 [31 Am. Dec. 498]. But the right of the respondents to control the amount which they may enjoy until they reach the age of twenty-five will postpone the execution of the trust until that time. The trust could not be discharged under the direction of the orphans' court after they arrive at majority, and therefore there is a reason for its continuance that did not exist in *Kuhn v. Newman*, 26 Pa. St. 227. But J. Alfred Kay has attained to the age of twenty-five, when, by the directions of the will, the whole of the income of the property devised is to be paid to him. Under the rule asserted in *Kuhn v. Newman*, *supra*, and *Bush's Appeal*, *supra*, his has therefore become a legal estate, as is the remainder limited after his decease. Considering, then, both the particular estate for life and the remainder as legal, the limitations of the will are to J. Alfred Kay for life, with a power of appointment among any of the issue of his body, and in default of appointment, to such issue; and if he die leaving no issue of his body, then over. That this created an estate tail in the first taker, admits of no doubt. The word "issue," in a will, is primarily a word of limitation. When used by a testator, the legal presumption is that he intended a limitation, not that the remainder never should take as purchasers. Nor is there anything in this will that indicates an intention of the testator that the word "issue" should have any other than its primary signification. There are not even words of distribution among the issue. Nor are there any words of superadded limitation. And there is a gift over if the tenant for life die leaving no issue of his body.

That this means an indefinite failure of issue need not be argued. The subject of the gift is money laid out in land. It is therefore real estate, and in such cases, "die without issue," or "in default of issue," or "for want of issue," or "on failure of issue," or "die without leaving issue," import the same thing, to wit, an indefinite failure of issue.

An estate-tail would therefore be implied from the devised over, even if there were no gift of a remainder directly to the issue of a class. And as estates-tail are by our act of 1855 converted into estates in fee-simple, it follows that J. Alfred Kay is the legal owner in fee-simple of one third of the property, and that the other complainants will be similar owners when they shall respectively attain the age of twenty-five years. No decree is at the present asked in favor of any other complainant than J. Alfred Kay, and we shall therefore only decree a conveyance to him.

In *Rush v. Lewis*, 21 Pa. St. 72, and in *Kuhn v. Newman*, *supra*, this court refused to decree a conveyance from the nominal trustee, in cases where the legal estate was held to be executed in the *cestui que trust* by force of law, on the ground that there was no necessity for it. Yet the nominal trust beclouds the title and embarrasses the rights of alienation which belong to the true owner. We think it better, therefore, to decree a conveyance, and such is the practice of courts of chancery, where the purposes of a trust once existing have been accomplished.

Decree reversed.

IN WHAT CASES LEGAL ESTATE VESTS IN BENEFICIARY, UNDER STATUTE OF USES.—At one time in England a large part of the land was held to uses, the legal title being in one person upon the trust and confidence that such person would apply it to the use of some other person. This system became at last the source of great abuses, to remedy which the statute of uses, so called (27 Hen. VIII., c. 10), was enacted. "The effect of the statute of uses was to destroy the estate of the feoffee to use, and to transfer it by the very act that created it to the *cestui que use*, as if the seisin or estate of the feoffee, together with the use, had *uno flatu* passed from the feoffor to the *cestui que use*." 2 Washburn on Real Property, 4th ed., 404; 1 Perry on Trusts, 2d ed., sec. 298. This statute has in effect been adopted into the legislation of a large part of the United States. It may thus often happen that although words of express trust are used in the grant or bequest of an estate to a trustee, yet no estate vests or remains in the trustee, as such statutes will execute the possession and the legal title in the same person to whom the equitable title is given.

Construction of Statute of Uses.—In construing the statute of uses, the courts of law and equity adopted three principal rules or reasons whereby convey-

ances were excepted from its operation, namely: 1. Where a use was limited upon a use; 2. Where a copyhold or leasehold estate or personal property was limited to uses; 3. Where such powers or duties were imposed with the estate upon a donee to uses that it was necessary that he should continue to hold the legal title in order to perform his duty or execute the power: *Hill on Trustees*, 230; 1 *Perry on Trusts*, 2d ed., sec. 300.

Use upon Use.—The first rule of construction which operated to evade the effect of the statute was, that where a use was limited upon a use, the statute executed only the first use, the second use remaining a mere equitable interest. This was settled in *Tyrrrell's Case*, Dyer, 155 a, and has been uniformly followed: *Durant v. Ritchie*, 4 Mason, 65; *Crozhall v. Sherard*, 5 Wall. 268; *Hurst v. McNeil*, 1 Wash. C. C. 70; *Reed v. Gordon*, 35 Md. 183; *Mattheus v. Ward*, 10 Gill & J. 443; *Owsman v. Broadnax*, 37 N. J. Eq. 523; *Hutchins v. Heywood*, 50 N. H. 496; *Wilson v. Cheahire*, 1 McCord, 233; *Ramsay v. Marsh*, 13 Am. Dec. 717; *Doe v. Passingham*, 6 Barn. & Cress. 305; *Burgess v. Wheate*, 1 W. Black. 160; *Williams v. Waters*, 14 Mea. & W. 166; *Whetstone v. Bury*, 2 P. Wms. 146.

Uses in Copyhold or Leasehold Estates or in Chattel Interests or Personal Property.—The statute of uses only affected such estates as were "seised" to uses, and this was construed to mean that only freeholds were affected thereby; and therefore leaseholds, and chattel interests in land and personal property given to uses, were not affected, and the use remained unexecuted as before the statute: *Sympton v. Turner*, 1 Eq. Cas. Abr. 383; *Doe v. Routledge*, 2 Cowp. 709; *Rice v. Burnett*, 1 Spears Eq. 579; *Pryon v. Mood*, 2 McMull. 293; *Joor v. Hodges*, Spears, 593. In the case of such interests, the legal title to them will remain in the trustee until the purposes of the trust are accomplished, and until the possession of the property is legally transferred to the person entitled to the use or the last use: *Doe v. Nichols*, 1 Barn. & Cress. 336; *Schley v. Lyon*, 6 Ga. 530; *Steele v. Brown*, 3 Mo. 176; *Harley v. Platts*, 6 Rich. L. 315.

Special or Active Trusts.—The third rule of construction above mentioned is less technical, but is of much more importance, in the consideration of the main question, in this country, than the other two rules stated. Special or active trusts were never within the purview of the statute; and if powers or duties are imposed upon a donee to uses, or in other words, a trustee, which make it necessary that he should continue to hold the legal title in order to perform his duty or execute the power, the trust is such a special or active trust as will remain unexecuted by the statute: *Mott v. Buxton*, 7 Ves. 201; *Norton v. Leonard*, 12 Pick. 152; *Wheeler v. Newhall*, 7 Mass. 189; *Chapin v. Universalist Society*, 8 Gray, 580; *Exeter v. Odiorne*, 1 N. H. 232; *Wright v. Pearson*, 1 Edw. Ch. 125; *Striker v. Mott*, 22 Am. Dec. 646; *Wood v. Wood*, 5 Paige, 596. Thus the operation of the statute is excluded, and the trust or use remains a mere equitable estate, where an agency, duty, or power is imposed on the trustee, by a limitation to him and his heirs to pay the rents: *Barker v. Greenwood*, 4 Mea. & W. 429; *Doe v. Hompray*, 6 Ad. & El. 206; *White v. Barker*, 1 Bing. N. C., 573; *Kenrick v. Beaucherk*, 3 Bos. & P. 178; *Garth v. Baldwin*, 2 Ves. 646; *Anthony v. Rees*, 2 Crompt. & J. 75; *Robinson v. Grey*, 9 East, 1; *Jones v. Say*, 1 Eq. Cas. Abr. 383; *Garth v. Baldwin*, 2 Ves. 646; *Neville v. Saunders*, 1 Vern. 415; *Leggett v. Perkins*, 2 N. Y. 297; *Brewster v. Striker*, Id. 19; *Meecham v. Steele*, 93 Ill. 135; *Morton v. Barrett*, 39 Am. Dec. 575; *Hutchins v. Heywood*, 50 N. H. 500; *McCosker v. Brady*, 1 Barb. Ch. 329; *Manice v. Manice*, 43 N. Y. 203; *Adams v. Perry*, Id. 487; *Barnett's Appeal*, 46 Pa. St. 392; *Shankland's Appeal*, 47 Id. 113; *Wickham v. Berry*, 53 Id. 70; *Ogden's*

Appeal, 70 Id. 501; *Deibert's Appeal*, 78 Id. 296, to apply rents to the maintenance of the beneficiary: *Sylvester v. Wilson*, 2 T. R. 444; *Doe v. Eddin*, 4 Ad. & El. 582; *Doe v. Ironmonger*, 3 East, 533; *Vail v. Vail*, 4 Paige, 317; *Gerard Ins. Co. v. Chambers*, 46 Pa. St. 485; *Porter v. Doby*, 2 Rich. Eq. 52; or in making repairs: *Shapland v. Smith*, 1 Bro. C. C. 75; *Tierney v. Moody*, 3 Bing. 3; *Brown v. Ramsden*, 3 Moore, 612; to invest the proceeds or principal, or apply the income of the estate: *Exeter v. Odiorne*, 1 N. H. 232; *Ashhurst v. Given*, 5 Watts & S. 823; *Vaux v. Parke*, 7 Id. 19; *Nickell v. Handly*, 10 Gratt. 336; to dispose of the estate by sale: *Bagshaw v. Spencer*, 1 Ves. 143; *Wood v. Mather*, 38 Barb. 473; to sell or mortgage for the payment of debts, legacies, or annuities, or to purchase other lands to be settled to particular uses: *Doe v. Rhoads*, 7 Ad. & El. 636; *Curtis v. Price*, 12 Ves. 89; *Bagshaw v. Spencer*, 1 Id. 142; *Spence v. Spence*, 12 Com. B., N. S., 199; *Smith v. Smith*, 11 Id. 121; *Chamberlain v. Thompson*, 26 Am. Dec. 390; *Vaux v. Parke*, 7 Watts & S. 19; to raise a certain sum of money for some prescribed purpose from the income of the estate: *Stanley v. Leonard*, 1 Edw. Ch. 87; *Wright v. Pearson*, Id. 110; to exercise control over the estate for the purpose of preserving contingent remainders: *Vanderheyden v. Crandall*, 2 Denio, 9; *Barker v. Crandall*, 4 Mea. & W. 431; *Biscoe v. Perkins*, 1 Ves. & B. 485; or to protect the estate for a given time, or until the death of some person, or until division: *Williams v. McConico*, 36 Ala. 22; *Nelson v. Davis*, 35 Ind. 474; *Morton v. Barrett*, 39 Am. Dec. 575; *Posey v. Cook*, 1 Hill (S. C.), 413; *McNish v. Guerard*, 4 Strobb. Eq. 66. And the statute will not operate, notwithstanding, on a trust to sell, a power be given to one of the *cestuis que trust* to control the sale in part: *Chapman v. Blissett*, Talb. 145; *Wykham v. Wykham*, 18 Ves. 396; nor because on a trust for payment of debts and legacies out of the proceeds of a sale of land, the direction is only in aid of the personal property: *Murthwaite v. Jenkinson*, 2 Barn. & Cress. 257.

Where, however, the trust is simply "to permit and suffer" the beneficiary to occupy the estate, or to receive the rents, the legal estate comes under the operation of the statute, and will be executed in the beneficiary: *Right v. Smith*, 12 East, 455; *Warter v. Hutchinson*, 5 Moore, 143; *Barker v. Greenwood*, 4 Mea. & W. 429; *Boughton v. Langley*, 2 Salk. 679; *Doe v. Biggs*, 2 Taunt. 109; *Gregory v. Henderson*, 4 Id. 773; *Wyham v. Brooner*, 63 Ill. 158; *Parks v. Parks*, 6 Paige, 107; *Ramsay v. Marsh*, 13 Am. Dec. 717; and it has been held that a trust to hold for the use and benefit of, and to apply the rents to, the beneficiary is executed in the latter, notwithstanding use is made of the word "apply": *Laurens v. Jenney*, 1 Spears, 356. The criterion, however, to determine whether the statute will operate, is whether any active agency, duty, or power is imposed on the trustee.

A mere charge of debts or legacies, however, will not vest the estate in the trustee, unless there be some direction to them to raise and pay the money, that is, to exercise an active trust for the purpose: *Kenrick v. Beaulerk*, 3 Bos. & P. 178; *Collier v. McBeam*, 34 Beav. 476; *Creaton v. Creaton*, 3 Sm. & Gif. 386; *Doe v. Claridge*, 6 Mau. & Sel. 657. It has been held that a trust to convey is an active trust: *Doe v. Eddin*, 4 Ad. & El. 582; *Doe v. Scott*, 4 Bing. 505; *Moot v. Buxton*, 7 Ves. 209; but if the direction in the trust merely implies a power of disposition, as this may be executed without any legal title, it is most probable that a trust of this kind would vest the legal estate directly in the beneficiary: *Burk v. Valentine*, 52 Barb. 412; *Reeve v. Attorney-General*, 2 Atk. 223; *Lancaster v. Thornton*, 2 Burr. 1027; *U. S. Bank v. Beverly*, 10 Pet. 532; S. C., 1 How. 134; *Deering v. Adams*, 37 Me. 264; *Fay v. Fay*, 1 Cosh. 94; *Guyer v. Maynard*, 6 Gill & J. 420; *Jemson v. Smith*, 4 Bibb, 307;

Jackson v. Schaubert, 7 Cow. 187; S. C., 2 Wend. 12; *Dabney v. Manning*, 3 Ohio, 321; *Burr v. Stimm*, 1 Whart. 266; *Hope v. Johnson*, 2 Yerg. 123.

Where several trusts are created in the same instrument, some of which the statute would execute, and under others of which the legal estate would remain in the trustees, the trustees will take the legal estate, and this, though the trusts are limited to arise successively: *Brown v. Whiteway*, 8 Harr. 156; *Hawkins v. Luscombe*, 2 Swanst. 375; *Horton v. Horton*, 7 T. R. 652; *Stockbridge v. Stockbridge*, 99 Mass. 244.

Married Women.—The law favors trusts for the benefit of married women, and therefore if an estate be given in trust for a married woman for her sole and separate use, or the like, or to permit and suffer a married woman to receive rents to her separate use, the trustees will take the legal estate, and it will not, as in other cases, be executed in the beneficiary: *Robinson v. Grey*, 9 East, 1; *Horton v. Horton*, 7 T. R. 652; *Neville v. Saunders*, 1 Vern. 415; *Ayer v. Ayer*, 16 Pick. 330; *Richardson v. Stodder*, 100 Mass. 528; *Rodgers v. Ludlow*, 3 Sandf. Ch. 104; *Franciscus v. Reigart*, 4 Watts, 109; *Williamson v. Holmes*, 4 Rich. Eq. 475; *Eschator v. Smith*, 4 McCord, 452; *Bass v. Scott*, 2 Leigh, 356; the object of such favor to married women being that if the statute should execute the estate in the wife, the husband would attain to certain rights which might defeat the intention of the donor; See cases cited next above, and see *Rice v. Burnett*, 1 Spears Eq. 580. In Pennsylvania, however, this rule does not obtain, and it is there held that an express trust for the separate use of a woman, even where active duties are given to the trustee, so that the trust is really active, cannot be created unless she is already married, or unless it is made in contemplation of her marriage: *Lancaster v. Dolan*, 1 Rawle, 231; *Smith v. Starr*, 3 Whart. 63; *Hammersley v. Smith*, 4 Id. 129; *McBride v. Smyth*, 54 Pa. St. 250; *Yarnall's Appeal*, 70 Id. 339; *Ogden's Appeal*, Id. 501; *Wells v. McCall*, 64 Id. 207; *Springer v. Arundell*, Id. 218; 7 Phila. 224; *Credland's Estate*, Id. 58.

Passive Trusts.—The foregoing tends to show that as to all except passive trusts the statute of uses has no operation, and the question as to how far the statute of uses exists or has force in this country depends upon the extent to which passive trusts in land exist in the states of this country. Pomeroy (2 Eq. Jur. sec. 986, note 1), says that "express passive trusts are very rare indeed in the United States, and are opposed to all prevailing notions of landed property and modes of dealing with it, and therefore this question is plainly more theoretical than practical."

It may be stated, however, generally, that the statute of uses operates, in most states, where it is embodied as a portion of the law, to execute passive trusts in land. In Vermont, Ohio, and Tennessee, it is probable, from the nature of the statutes, that the statute of uses is not effective or recognized. In Alabama, Arkansas, Connecticut, Delaware, Georgia, Indiana, Maine, Iowa, Kansas, Maryland, Minnesota, Missouri, New Hampshire, New Jersey, Rhode Island, South Carolina, and Texas, the statute of uses has practically been re-enacted, and in these states the foregoing rules will fully apply. In Massachusetts and Rhode Island, the statute has been partially adopted, and if for any reason it is necessary in order to give effect to the conveyance, the statute will be construed as operative in accordance with the above rules. In Virginia, North Carolina, Florida, Illinois, Kentucky, and Mississippi, the statute is enforced so as to transfer the possession to the use in cases of bargain and sale deeds, lease and release, and deeds operating by way of covenant to stand seised to uses. As to uses or trusts raised in any other manner, they probably remain mere equitable estates as before the statute. In New

York, and in Michigan and Wisconsin, which follow the New York rule, all uses and trusts are abolished except where expressly authorized. In Louisiana and California (the real-property law of which states comes from the civil, French, and Spanish law), the statute of uses probably has little or no influence.

The law in Pennsylvania is peculiarly different from that in other states. One special rule established in Pennsylvania is that an express trust for the separate use of a woman, even where active duties are given to the trustee, so that the trust is really active, cannot be created unless she is already married, or unless it is made in contemplation of her marriage: *Pickering v. Coates*, 10 Phila. 65; *Ash v. Bowen*, 10 Id. 96; *O'Brien's Appeal*, 70 Pa. St. 501. This particular rule often operates in connection with others which are to be mentioned. The two main points of peculiarity in the law as settled in Pennsylvania, are the following: 1. Some species of trusts are treated as executed by the statute as though they were wholly passive, so that the entire estate, legal and equitable, vests at once in the beneficiary, which, by the general law of England and of this country, are not thus executed, on the ground that they are in reality active trusts; as, for example, where land is given in trust to convey it to the *cestui que trust*: *Bacon's Appeal*, 57 Pa. St. 504; *Rife v. Geyer*, 59 Id. 393; *Yarnall's Appeal*, 70 Id. 335; *Nice's Appeal*, 50 Id. 143; *Barnett's Appeal*, 46 Id. 392. 2. Several species of trusts are treated as passive, which, by the general doctrine, are undoubtedly active; certain trusts which require active duties by the trustees are held to be passive, and the whole estate to vest in the beneficiary; for example, a trust to receive rents and profits, and pay them over, is clearly active, while a trust to "permit and suffer" the beneficiary to receive is passive by the English law: *Wagstaff v. Smith*, 9 Ves. 520; but this distinction seems to be denied in Pennsylvania: *Rife v. Geyer*, 59 Pa. St. 395. From the combination of these rules, it follows that there may be trusts strictly active, which are not affected by the statute, and in which the legal and equitable estates are kept separate. But the leaning is strongly to regard trusts as passive; many instances are treated as passive, which, by the generally received law, are active; and especially where an active trust for any reason fails of its purpose, or its purpose is accomplished, the tendency is strongly in favor of holding it executed, and the estate is vested in the beneficiary: 2 Pomerooy's Eq. Jur., sec. 98, note; *Pickering v. Coates*, 10 Phila. 65; *Ash v. Bowen*, 10 Id. 96; *Debert's Appeal*, 78 Pa. St. 296; *William's Appeal*, 83 Id. 377. In earlier decisions these views were carried to a still greater length: *Kuhn v. Newman*, 26 Pa. St. 227; *Whickcote v. Lisle*, 28 Id. 73; *Rush v. Lewis*, 21 Id. 72; and the principal case of *Kay v. Scates*.

The foregoing *résumé* shows that the Pennsylvania cases cannot always be taken as safe authority in other states upon the subject of active and passive trusts, and the extent to which they are executed by the statute of uses.

A full discussion of the statutes on this subject will be found in 1 Penn. on Trusts, 3d ed., sec. 299, note.

WEIMER v. CLEMENT.

[37 PENNSYLVANIA STATE, 147.]

VENDOR IS NOT ANSWERABLE FOR QUALITY OF CHATTELS SOLD, unless he has expressly warranted them, or has been guilty of fraudulent representation, or affirmation of a quality known to be false.

TO CREATE EXPRESS WARRANTY, IT IS NOT ABSOLUTELY NECESSARY to use the word "warrant," if the words employed are tantamount to it, and are not dubious or equivocal.

CIVIL-LAW MAXIM, THAT "A SOUND ARTICLE IS WARRANTED BY A SOUND PRICE," was not the maxim of the common law, and has never been adopted in Pennsylvania.

NO EXPRESS WARRANTY ARISES FROM MERE UNFOUNDED NAKED AFFIRMATION of soundness in the sale of a chattel, but for a willful misrepresentation, the remedy is by action *ex delicto*.

IN ACTION BY VENDOR FOR PRICE OF CHATTEL, vendee may set up willful misrepresentation and deceit to resist a recovery, and by proving a failure of the consideration, show that in equity and good conscience the plaintiff ought not to recover.

ASSUMPSIT. The opinion states the facts.

Bellas and Pleasants, for the plaintiff.

Jordan, for the defendant.

By Court, CHAMBERS, J. This is an action of *assumpsit* on a promissory note for one hundred dollars, given by Clement to Weimer, in part payment of an old canal-boat, sold at one hundred and fifty dollars, on which Clement had paid in part fifty dollars. Defendant pleaded payment with leave, and *nil debet*, and gave notice of special matter, that "plaintiff at and before the time of sale represented the boat as in good condition, and fit for immediate use, whereas she was worthless and altogether unfit for use." In this notice there is no allegation of warranty express or implied, on the part of the plaintiff, nor is there any imputation against him of fraud or deceit in the sale.

It is the sale of a chattel, examined by Clement before he purchased, known as an old boat requiring repairs, then sunk in the river, on her bottom, lop-sided. After examination and inquiry, Clement proposed to purchase this boat at the sum of one hundred and fifty dollars—an interview is had between him and the plaintiff, who expressed the opinion "that he thought, by a little repair the boat would run a season," and had asked for her two hundred dollars. Weimer's knowledge of the condition of the boat, beyond what was obvious, was obtained from his agents, Hillis & Clark, who, for him,

had some charge of the boat. Weimer directed Hillis to tell Clement all he knew about the boat, and Hillis testified that he did inform Clement of her bad condition, which was before the purchase. Clement was fully aware that he was to have a defective boat requiring immediate repairs, if capable of use. After the purchase, the defendant allowed her to lie lop-sided on the shore, partly in the water, exposed to sun and weather, for two months, before drawing her out for repairs, when she was found to be more decayed than he expected. Weimer appears to have acted in the transaction with good faith, and there was no reason to suspect the sincerity of his opinion about the condition of the boat. The parties were negotiating for the sale of an old boat, in bad condition, and in respect to which Weimer and Clement had the same means of information.

We can discover no warranty, express or implied, by the plaintiff, to be collected from the evidence on the record; nor is there any deceit, fraud, or willful misrepresentation by the plaintiff, proved or even imputed to him.

The defendant got the article which he had examined before he purchased, and of her unsoundness had the opinion of others, and was to pay for her, not the price of a good article, but a defective one. He chose to speculate on the condition of the old boat, and the amount of repairs she might require; and if disappointed in his expectations, he must bear the loss. He was bound to regard the sound maxim of the law *caveat emptor*, and by the caution and inquiry made by him, he did use the vigilance imposed on him. What are the legal responsibilities of the vendor of a chattel in Pennsylvania? It is well settled that, with regard to the quality of goods, the vendor is not answerable unless he expressly warrants them, or there has been a fraudulent representation—an affirmation of a quality known to the vendor to be false: *Jackson v. Wetherill*, 7 Serg. & R. 480. To constitute an express warranty, it is not necessary that the word "warranty" should be used; but the words used must be tantamount, and not dubious or equivocal.

The civil-law maxim, that a sound article is warranted by a sound price, was not the maxim of the common law, and has not been adopted by this court. If the buyer, instead of requiring an explicit warranty, chooses to rely on his own inspection, or the opinion of the vendor, if mistaken as to quality, he has only himself to blame. If overreached by willful misrepresentation or deceit, he has his remedy. No

implied warranty arises from an unfounded affirmation of soundness in the sale of a chattel; but for a deceitful representation of it the remedy is by an action *ex delicto*: *McFarland v. Newman*, 9 Watts, 55. A naked affirmation is not itself an express warranty, nor evidence of it. In an action for the price of a chattel sold, the defendant may use the defense of willful misrepresentation and deceit to resist a recovery, and by proving a failure of consideration, show that in equity and good conscience plaintiff ought not to recover on a contract vitiated or impaired by deceit and fraud, as was ruled at our present term in the case of *Price v. Lewis* [not reported]. What the direction of the court below in this case was to the jury, in matter of law, is left in uncertainty. The charge of the court, and their answers to the points presented, have been lost or mislaid, and cannot be supplied; and it is only a fragment of the opinion of the court on one point only that by the agreement of the counsel has been placed on the record and paper-books. It may be of questionable propriety for the court to review and consider a scrap of an opinion, as all the direction of the court below to the jury on the law. But we feel constrained, in furtherance of justice, to act on the meager report we have before us on the record, in the absence of a full one, not to be had by reason of the decease of the judge before whom the cause was tried, and where the verdict is so contrary to the law and evidence as it appears to this court.

The plaintiff has assigned for error the refusal of the court below to answer plaintiff's point as presented, or answering it erroneously, if answered at all: "The plaintiff's counsel respectfully request the court to refuse giving the instruction above asked, and to instruct that unless Weimer was guilty of of willful misrepresentation, he is entitled to recover; and as there is no evidence of that, the verdict should be for the plaintiff." To this point the plaintiff was entitled to an explicit answer, and to have the jury instructed that unless Weimer was guilty of willful misrepresentation, he is entitled to recover; and that if there was not evidence satisfactory to them of such willful misrepresentation, the verdict should be for the plaintiff. To this, as reported, the court gave no answer, or answered thus: "A mutual mistake is no ground for relief: there must be some misrepresentation." This was not the answer the plaintiff was entitled to have, and so far as given, was not intelligible or directory to the jury. The evidence in

the cause, as to the contract of the parties, was for the consideration of the jury, under the law of the case; and as there was little or no discrepancy about the facts, and no imputation of warranty, fraud, or willful misrepresentation to the plaintiff, the verdict, being for the defendant, can only be accounted for by the misconception of the jury as to the law, and to which the omission of the court to answer plaintiff's point, and the answer furnished, may have materially contributed and misled the jury. In the opinion of this court, there was error in the court below in their answer, as recited above.

Judgment is reversed, and a *venire de novo* awarded.

CAVEAT EMPTOR IS RULE OF SALES IN ABSENCE OF FRAUD OR WARRANTY: See *Brown v. Gray*, 72 Am. Dec. 562, and note 566, citing the prior cases in the series on this point; *Eagan v. Call*, 75 Id. 653, and note 655. The principal case is cited to this point in *Heilbruner v. Weyte*, 51 Pa. St. 261, the court there holding on this point that if no fraud is alleged, it is necessary to show an express warranty in order to defend on the ground of the inferior quality of the article sold.

STEWART v. LANG.

[37 PENNSYLVANIA STATE, 201.]

TO DETERMINE WHETHER INSTRUMENT IS TO OPERATE AS IMMEDIATE CONVEYANCE or only as executory contract, the court will look to the intention of the parties, and this is to be sought for in every part of the contract.

INSTRUMENT IS NOT PRESENT CONVEYANCE, BUT IS MERELY EXECUTORY CONTRACT, though it contains the words of present assurance, "doth and hath by these presents granted, bargained, sold, and forever quit-claimed," etc., if it be informally drawn; called by the parties an agreement; expressed to be in consideration of future covenants to be done and performed, and with no present sum in hand paid; contains no words of inheritance; and be without the formal acknowledgment of a deed.

EJECTMENT. One Lang, having recovered judgment against William A. Stewart, took certain land claimed to be owned by said Stewart under execution, and bought it in at execution sale. William A. Stewart's title had been derived through an agreement of compromise between himself and his father, George Stewart, in an action pending between them. George Stewart died; and his executors, claiming that the title to the property had not fully passed to William A. Stewart, the agreement being but an executory agreement, brought this action against Lang. The agreement was in the following

words, to wit: "Agreement, made this first day of January, 1849, by and between George Stewart and William Stewart, all of Perry township, Jefferson county, witnesseth, that the said George Stewart, for and in consideration of the covenants to be done and performed by the said William Stewart, he doth and hath by these presents granted, bargained, sold, and forever quitclaim unto the tract of land whereon the said William now lives, in Perry township aforesaid, and to withdraw or discontinue all suits or suit now brought by him in the courts of common pleas of Jefferson county, and acknowledge full satisfaction of all or any agreements now or heretofore in existence between them. In consideration of which, the said William Stewart agrees to pay the said George Stewart as follows: One hundred dollars, lawful money, on the first day of April, A. D. 1849. One hundred dollars on the first day of April, 1850. One hundred dollars first of April, 1851, and one hundred dollars per annum thereafter till the sum shall amount to twelve hundred dollars, including the sums now mentioned, and to pay to the said George Stewart seventy-five dollars in such produce as he may from time to time need after this date, and such produce as the said William may have to spare. Witness our hands and seals the day and year aforesaid. George Stewart [L. s.], William A. Stewart [L. s.]. In presence of H. Brady." The court instructed the jury that the above agreement was executed, and that the verdict must be for defendant. The verdict was rendered accordingly. Plaintiff appeals.

B. F. Lucas, for the plaintiff in error.

J. G. Gordon, for the defendants in error.

By Court, *STRONG, J.* In determining whether the instrument dated January 1, 1849, was an immediate conveyance or only an executory contract, we are to look for the intention of the parties, and this is to be sought for in every part of the contract. It contains words of present assurance ("doth and hath by these presents granted, bargained, sold, and forever quitclaim," etc.), and these words doubtless afford a presumption that an executed conveyance was intended. But that presumption is not conclusive. It may be overcome by the presence in the instrument of other words, which contemplate a future conveyance, as it was in the case of *Stokely v. Trout*, 8 Watts, 163, where the words of immediate grant were, "have granted, bargained, sold, aliened, enfeoffed, released, and con-

firmed," and where the instrument acknowledged the receipt of part of the consideration, but the vendor covenanted to "make a more complete deed of conveyance." So also in *Stouffer v. Coleman*, 1 Yeates, 393. The same principle is laid down also in *Williams v. Bentley*, 27 Pa. St. 301, where it was said that "the intention is so imperative in the construction of agreements that the strongest words of conveyance in the present tense will not pass the estate, if other parts of the instrument show that this was not the intention of the parties. A provision in the contract for the conveyance of the title at a subsequent time, on the performance of stipulated terms, is generally decisive that the article of agreement itself was not designed to pass the title." The presumption arising from the use of words of transfer in the present tense may also be overcome by other parts of the instrument, though there be no covenant for future conveyance. It was in *Williams v. Bentley*, 27 Pa. St. 301; *Foster v. Foster*, 1 Lev. 55; and in *Ogden v. Brown*, 33 Pa. St. 247. In the last of these cases the rule was averred to be, that "whether an informal instrument, transferring an interest in real estate, shall be held a conveyance or only an agreement for a conveyance, depends, not on any particular words or phrases found in it, but on the intention of the parties as collected from the whole contract." In the instrument now before us there are several things which are inconsistent with the presumption that the parties intended it as a final disposition of the subject-matter of their contract, and which tend, therefore, to rebut the inference which, without them, must necessarily be drawn from the vendor's use of words of present conveyance.

It is called by the parties an agreement, a circumstance to which importance was attached in *Stokley v. Trout*, *supra*, and which has been considered of some weight in other cases. In popular understanding there is a distinction between an agreement and a deed. The former is regarded as preparatory to the latter. A sale by articles of agreement and a sale by deed are in the common mind distinct in effect. When, therefore, the inquiry is what the parties intended, it cannot be said to be of no consequence that they have called their contract an agreement.

It is to be observed, also, that the consideration for the action of George Stewart, the alleged grantor, seems to have been not the covenants of the vendee, but the performance of them. It was in consideration of covenants "to be done and

performed," and by the terms of the agreement, that performance was to be prospective. If, therefore, the instrument be construed a present conveyance, it is a conveyance for no present stipulated consideration, none in hand received. This, it must be admitted, is in itself of no great importance, but it is not without weight, in connection with other provisions of the agreement. In addition to these things, there are no words of inheritance in the instrument. If the parties intended it as an executed contract, then but a life estate passed to William A. Stewart, the vendee. That such an effect was the design of the parties, when by the same instrument it was agreed that twelve hundred dollars should be paid by the vendee in annual installments, extended twelve years, and also seventy-five dollars in produce, such as the vendor might from time to time need after the date of the instrument, and such produce as the vendee might have to spare, it is difficult to believe.

But a more important thing, and one which appears to show quite satisfactorily that the agreement was not intended by the parties as a consummation of the proposed arrangement, is found in the provisions that George Stewart should withdraw and discontinue all suits in the court of common pleas of Jefferson county, and acknowledge full satisfaction of all and any agreements then and theretofore in existence between the parties. These provisions are in immediate connection—in the same sentence with the words of grant. Yet they refer to something thereafter to be done by the grantor, and they show, at least, that the whole contract was not considered as executed by him. The same words which, it is argued, conveyed the land, are used to express the obligation to discontinue the suits. If, in regard to the latter, they must be construed as prospective, why not in regard to the former? Certainly something more than the execution of this instrument was understood to be required of the vendor. Besides, such stipulations on the part of a grantor are altogether unusual and out of place in a conveyance of lands. Even their presence there seems to show that the parties contemplated further action, a more complete arrangement.

It is also a slight circumstance, an index, pointing to the intention that the agreement was not executed in the ordinary forms of a deed. Its execution was not acknowledged, and it was attested only by a witness. It was treated by the parties

as executory agreements are commonly treated, and not as an immediate conveyance of land.

Considering the whole instrument, therefore, we think it evinces that the intention of the parties was not to create an absolute and present conveyance of the land. It follows that it was only executory. It was said in the argument, and it is stated in the paper-books, that William A. Stewart obtained the legal title from the Holland Land Company after his agreement with his father. This does not appear upon the record, and we are not, therefore, at liberty to consider what may be the effect of such a conveyance. Dissenting, as we do, from the construction given by the learned judge of the court below, to the agreement of January 1, 1849, we are constrained to reverse the judgment.

Judgment reversed, and a *venire de novo* awarded.

WHEN WORDS OF PRESENT GRANT DO NOT CONVEY TITLE: See note to *Chapman v. Glasse*, 48 Am. Dec. 45-47, citing many cases, and discussing the subject fully. In *Bruner's Appeal*, 57 Pa. St. 53, the principal case is cited to the point that the court may look to the intention of the parties to determine whether an instrument is to operate as an immediate conveyance.

COMMONWEALTH INSURANCE COMPANY v. SENNETT, BARR, & Co.

[87 PENNSYLVANIA STATE, 205.]

INSURANCE IS CONTRACT OF INDEMNITY, IN WHICH PARTIES MAY STIPULATE for the manner and time in which that indemnity shall be made and valued; and where such is the case, the law will carry out their contract.

MEASURE OF DAMAGES ON OPEN POLICY OF INSURANCE, specifying that damages are to be estimated at the "true and actual cash value of the property at the time the loss may happen," is that which was agreed upon by the parties, and it is error to allow the jury to adopt any other rule.

RESERVATION BY INSURERS IN POLICY OF PRIVILEGE TO REPAIR OR REPLACE the property destroyed is merely a privilege for their benefit, which they may adopt or not as they think proper, and therefore the expense of repairing or replacing the property is not a proper rule for estimating the damages, on a contract to measure the damages by the value of the property when the loss occurs.

FACT THAT PROPERTY DESTROYED WAS PATENTED cannot affect a contract to measure the damages by the value of the property at the time when the loss occurred.

DEBT. Plaintiffs were the owners of certain patented agricultural machines, and had stored them in a warehouse, where they were destroyed by fire. Defendants had agreed to insure

plaintiffs against any loss of such property by fire, the parties stipulating that the value, in case of loss, was to be determined on the basis of the "true and actual cash value of the property at the time the loss may happen." The remaining facts appear in the opinion.

W. A. Galbraith, for the plaintiff in error.

Church and Marshall, for the defendants in error.

By Court, THOMPSON, J. There is nothing in the policy of the law which abridges the right and power of parties to a contract of insurance from stipulating in regard to the mode and manner of estimating or valuing a loss when it shall occur, or as to the time which shall be the period of the valuation of the property destroyed, or such other matters within the scope of a fair transaction as they may see proper. Insurance is a contract of indemnity, and if the parties stipulate for the manner in which that indemnity shall be made, on the contingency of liability, it is their right to do so, and the law will carry out their contracts as made, if there be no fraud in them, as in other cases: *Trask v. State Fire and Marine Ins. Co.*, 29 Pa. St. 198 [72 Am. Dec. 622]; *North Western Ins. Co. v. Phoenix Oil and Candle Co.*, 31 Id. 448.

Mr. Phillips, in his treatise on insurance, c. 1, sec. 3, says: "The indemnity intended in insurance is not the putting the party insured into as good a condition as he would in fact have been if no loss had happened; it means the repayment of the expense incurred, and the payment for as much of the insured subject as is lost, at its market value, or its value as agreed upon in the policy."

The policy in this case was an open one as contradistinguished from a valued policy, and in it the parties have chosen to fix for themselves the standard of valuation, and have stipulated that it should be the "true actual cash value of the property," and the time for ascertaining such value to be the date of its injury or destruction by fire. Now, unless it can be shown that they had not the right so to contract, or have used terms possessing some other than their ordinary meaning and import, this basis for estimating the loss thus established must control and govern. It is the law of the contract established by the parties themselves. Nothing has or can be shown, we think, to countervail their right so to contract in regard to the subject-matter mentioned, or which controls the ordinary meaning of the terms used by them.

This has not and cannot be done. The contract is so plain, that interpretation is not needed to arrive at what was meant. The parties meant only what they have plainly said; and it was a plain mistake to disregard the language used and construe the contract as if no stipulation existed.

It is usual, in the absence of a stipulation in marine insurance, to value the goods lost and covered by an open policy, as of the time of the commencement of the risk, and this was the nature of the insurance treated of by Mr. Phillips, as cited by the counsel for the defendant in error.

I will not attempt to point out the distinctive differences in this respect between marine and fire insurances, and wherein they consist. If we were dealing with a policy in which no stipulation existed for determining when or how the valuation should be made, and the question were to be determined by principles of law exclusively, we might be required to look more closely to them. But such is not the case here. The parties have made the law of this contract in this particular for themselves, and we must administer it. They have covered the whole ground.

The case of *Niblo v. North American F. Ins. Co.*, 1 Sandf. 558, has no possible bearing on the point in question. There the policy contained no stipulation such as we find here, and the court allowed the full value of the tenement insured without regard to the extrinsic circumstance that it was to be removed within fifteen days. They held that peradventure the lease of the ground might be renewed, or the insured might sell it to the owner of the ground, or its value might not be impaired by removing it to an adjacent vacant lot. Intrinsically it was not impaired by the circumstance that the ground lease was soon to end. Such had been the doctrine laid down in *Laurent v. Chatham Fire Ins. Co.*, 1 Hall, 41. Such cases as these are good enough law where they belong, but furnish no rule where the parties have fixed a law for themselves. These views apply as well to the restricted operation of the testimony received as to the ruling in answer to the defendant's eleventh point. There was error in both.

The option to replace the machinery, if destroyed, was a reservation for the benefit of the company; they were not bound to adopt it. What it would cost to replace it was, therefore, not to furnish the rule for the damages which the company must pay to make good the loss. If this were to be held, it would be equivalent to enforcing the option as an obli-

gation. It is stated in Angell on Insurance, sec. 269, that insurers have the privilege of making repairs or replacing property if they see fit to do so; but if they elect not to do so, "they are liable only to pay a fair indemnity for the loss." This shows that the estimated cost of a compliance with the option is not to be considered in assessing the amount to be paid on the loss. If it had any weight here, it was wrong.

Nor was the fact that the machines insured were constructed under a patent of any importance. Patented or unpatented, what they were worth at the happening of the fire was, by the agreement of the parties, to be the measure of their value; and this must be ascertained by testimony, as is done in every other case where the value is not fixed.

For these reasons, the judgment is reversed, and a *venire de novo* awarded.

THE PRINCIPAL CASE IS CITED to the point that an action of debt is sustainable on a demand for a loss under a fire insurance policy: *Glward Fire Ins. Co. v. Field*, 45 Pa. St. 184; S. C., 3 Grant Cas. 332.

PARTIES TO INSURANCE POLICY MAY STIPULATE IN REGARD TO MODE AND TIME of estimating or valuing loss when it occurs: See *Trask v. State Fire & M. Ins. Co.*, 72 Am. Dec. 622, and note 624.

EDINBORO' ACADEMY v. ROBINSON.

[57 PENNSYLVANIA STATE, 210.]

SUBSCRIBERS TO COMMON FUND FOR COMMON PURPOSE become an association of persons united for the carrying out of such purpose, as soon as the stipulated amount of money has been subscribed; and such act of association involves an agreement to organize for the purpose contemplated.

EACH SUBSCRIPTION TO COMMON FUND FOR COMMON PURPOSE is contract by each associate with his fellows, in consideration of similar contracts by them to contribute to the common fund the amount subscribed, and when the full sum is subscribed and the association organized, raises a duty and liability on the part of each subscriber to pay the sum subscribed.

ORGANIZATION BY LEGAL INCORPORATION OF PERSONS WHO HAVE SUBSCRIBED to a common fund for a common purpose, when regularly accomplished by the common consent of the associates, constitutes the corporation the true and only organization to which subscriptions are to be paid, and the proper and legal party to demand and enforce their payment.

IN ACTIONS ON SUBSCRIPTIONS TO COMMON FUND, where the associates legally incorporate, the proceeding should be in the name of the corporation; but if the names of the trustees have been added as parties plaintiff, an amendment may be allowed so as to permit the corporation to appear simply by its corporate name.

ACTION to recover of defendant an installment on his subscription to a fund for the erection of the Edinboro' Academy. The defense was that the incorporation of the subscribers, as the 'Edinboro' Academy,' without the defendant's assent, released him from his subscription, and that the corporation was not authorized to collect the same. The remaining facts appear in the opinion.

Kelso and Walker, for the plaintiff.

Church and Marshall, for the defendant.

By Court, LOWRIE, C. J. So soon as this subscription paper became complete by the subscription of the stipulated amount of money, the subscribers to it became an association of persons united for contributing to a common fund for a common purpose, to be carried out by themselves. Then the subscription of each (at least if not withdrawn before the actual organization of the associates) became a contract by each associate with his fellows, in consideration of similar contracts by them to contribute to the common fund the amount subscribed by him.

Such an act of association involves an agreement to organize the associates when the subscription shall be complete, and in the present case this is expressly provided for. The duties created by the act of subscription are duties to the association, and the first of them that is to be performed is the duty of organization; and when this is complete, the duty of paying the sum subscribed is a duty to the organized association. In a legal aspect, the most perfect form of organization is by legal incorporation, and therefore, this, when regularly obtained by the common consent of the associates, must be regarded as the true organization of the association, and the corporation becomes the proper legal body to which the subscriptions are to be paid, and which is to sue for them. There can be but one true organization.

The court below was, therefore, in error in deciding that the action was improperly brought in the name of the association in its corporate form. The decision ought to have been that if the associates did organize themselves by legal incorporation, then the corporation is the organized association, and is the proper legal party to demand and enforce the payment of the subscriptions.

The question of fact is therefore involved in the true decision,

Did the associates organize themselves in this corporation called the Edinboro' Academy?

The decision of the court below excluded this question, though it is the vital one of the cause. It may not be easily decided, because there is no complete prescribed form for the process of organization. And so it is in the original organization of states, and there we take the fact of the existing organism as proof of its legitimacy without inquiring into the regularity of the formative process. And in such a case as this, if we find the associates acting as members of the organism, we assume the regularity of its formation as against them. The only form agreed upon here for the process of organization is, that it shall be by a meeting of the associates held according to notice to be given. If such a meeting was held on reasonable notice, and if by consent of a majority the corporate form of organization was adopted or assented to, the corporation is the organized body contemplated by the contract of subscription, and has the right to demand and receive the sums subscribed.

The law rather pardons than approves the naming of the trustees of the corporation as plaintiffs in such an action before a justice of the peace.

In court the form ought to be amended so as to let the plaintiff appear in its simple corporate name.

Judgment reversed, and a new trial awarded.

THOMPSON, J., having been of counsel in the case, did not sit.

SUBSCRIPTION, EFFECT OF, AND WHEN BINDING: See *Phipps v. Jones*, 59 Am. Dec. 708; *Galt v. Swain*, 60 Id. 311, and notes. As soon as the associates who have subscribed organize, the subscription is binding, and if they incorporate in regular form, the corporation is authorized to collect the subscriptions: *Shober v. Lancaster C. P. Ass'n*, 68 Pa. St. 431; and a subscriber is liable though the mode of organization was without his direct and express assent: *Robinson v. Edinboro' Academy*, 3 Grant Cas. 106; *Hedge & Horn's Appeal*, 63 Pa. St. 279, all citing the principal case.

GIRARD FIRE AND MARINE INS. CO. v. STEPHENSON.

[57 PENNSYLVANIA STATE, 238.]

IN APPLICATION FOR INSURANCE, WHERE NEIGHBORING BUILDINGS, one of which was a carpenter-shop, were properly located and described, and the purposes for which they were used stated, in response to inquiries, it was neither a fraudulent concealment of material facts, nor a breach of the covenants of the assured, to omit to state that such carpenter-shop

was heated by stoves, or to say what provision was made for warming, unless, perhaps, the heating was effected in an unusual and extraordinary manner.

IN ACTION ON INSURANCE POLICY TO RECOVER FOR LOSS BY FIRE, which originated in an adjoining carpenter-shop, the location of which was properly given in the application for insurance, it is not error to permit the jury to decide whether stoves are necessary and customary in a carpenter-shop, when coupled with the instruction that if not necessary and customary plaintiff could not recover; nor is it error to permit the jury to decide whether the placing of a steam-engine in the shop, by which the stoves were superseded, had increased the hazard over what it would have been from the stove alone, with the instruction that if it had done so, and the loss was the result of the change, the plaintiff must fail, but if not, the loss must fall upon the company, even though the fire may have originated from the engine.

UNDER INSURANCE POLICY PROVIDING THAT ALTERATIONS OR REPAIRS made in and about the insured premises must be at the risk of the party insured, such repairs or alterations do not *per se* avoid the contract, but only place upon the insured party the hazard of their increasing the liability of the insurer.

THAT COURT IN CHARGING JURY EXPRESSED DOUBTS AS TO LEGAL EFFECT which certain evidence might have had in a supposed contingency, and which was not in the case as presented to the jury, is no cause for reversal or writ of error.

ACTION on insurance policy. The opinion states the facts.

Finny and Douglass, for the plaintiff in error.

W. M. Stephenson, for the defendant in error.

By Court, **STRONG, J.** The written application for the policy contained a provision that the representations made by the assured therein were given as a warranty, and the policy itself stipulated that the representations given in the application should be a warranty on the part of the insured, and contain a just, full, and true exposition of all the facts and circumstances, in regard to the condition, situation, and value of the property insured. Among the interrogatories propounded by the company, the answers to which make a part of the application, was the following: "State the distance to other buildings. For what are the nearest buildings occupied? and of what materials are they built?" To this the answer of the assured was, "Shop for carpenter on the west; distance, twenty-five feet; not much used. No other buildings within two hundred feet, on the same side of the street. One frame building on the other side of the street, distant eighty feet." The insured premises having been injured by fire, which originated in the carpenter-shop, the defendants set up as a defense against their liability on the policy, that, after it was

signed, the insured introduced a steam-engine into the shop, and used it in working lumber. On the trial of the cause in the court below, the jury were instructed, in answer to points propounded by the defendants, that the shop was a circumstance in the estimate of the risk taken by the underwriters, and that a voluntary enhancement of the risk by a change of the occupancy and use of the shop by the plaintiff himself would be a breach of the covenants of the policy on his part, and would prevent his recovery. They were also instructed that the covenants in the policy were to be construed with reference to the character of the risk taken, and if this was incompatible with the use of an engine and stove for working lumber in the shop by the plaintiff, it was an increase of the risk and avoided the policy. That it made no difference as to the operation of the covenants of insurance that the shop stood on one lot and the insured house on another, or that the assured had acquired the property from different owners. That if the risk had been so changed as to become one which the underwriters would not have taken without an increased premium, or would have refused altogether, its voluntary enhancement by the plaintiff would prevent his recovery. That if the assured obtained the policy, under the representation that the shop would not be much used, and that no fire would be used in it, intending at the same time to occupy it permanently through the winter with a steam-engine and stove in which fires should be kept, it was a fraud upon the company, and would avoid the contract.

The court also instructed the jury that the setting up a steam-engine and use of the same in the shop was a change of the occupancy of the premises from the occupation stipulated in the application, and contrary to the covenants of the assured, if it increased the hazard and was the cause of the fire. Of all this the plaintiffs in error do not complain, nor could they. But they insist that the court erred in adding to these instructions the remarks that "the shop belonged to the plaintiff (the assured) at the time when he made his application; and when this was laid before the officers of the company, their action would necessarily be predicated upon the information, the several answers to the questions just imparted, and they would naturally consider whether a stove was necessary to the proper use and occupancy of a carpenter's shop, and this, we may suppose, would have its effect upon the deliberations of the officers in taking or rejecting the application.

One or two witnesses say there had been two stoves in the shop for heating it. Was this necessary and customary? If it was not, the plaintiff must fail. But if it was, then another inquiry arises, whether the placing of the engine in the shop, by which the use of the stoves would be superseded, increased the hazard over what it would have been for the stoves alone. If it did, and the loss was the result of the change, the plaintiff must fail. But if it superseded the stoves for heating, and was used for other mechanical purposes, but did not increase the hazard to any extent, the loss would fall on the company, although the fire may have originated from the engine."

I have quoted these assignments of error at length, in connection with the other instructions given to the jury, that their true bearing upon the case may be understood. The grounds of defense in the court below, then, not sustained by the charge of the judge, were that the representations in the application had not fully stated the circumstances material to the risk, in that there was no information given that there was a stove in the carpenter's shop, near the insured premises, and that the hazard had been increased by the voluntary act of the plaintiff. The description given of the neighboring building was a shop for a carpenter, not much used. Was it, then, a fraudulent concealment, or a breach of the assured covenants, that he did not state that the carpenter's shop was heated, and what provision was made for warming it? If instead of being a carpenter's shop, the adjacent building had been a dwelling-house, would he have been under obligation to state that there were stoves in that dwelling-house? And if he had neglected to do so, would his neglect have avoided the policy? A representation that a carpenter's shop stood twenty-five feet from the insured premises informed the insurers that what is commonly understood by such a shop, what ordinarily constitutes it and belongs to its use was there. If there had been anything extraordinary in the manner of its being used or heated, anything which increased the risk of fire, it might have been his duty to communicate it specifically. But what is usual, what, in the language of the court below, is "customary in such buildings, was communicated by the representation of the existence of the shop. In general, the use even of the building insured, and how it is heated, need not be represented, except in reply to inquiries: Phillips on Insurance, 636, and cases there cited. That no more specific

representations were contemplated by the parties, is apparent from the interrogatories addressed by the company to the applicant for the policy. He was asked how the building proposed for insurance was warmed, and how lighted; but he was not asked how neighboring buildings were warmed and lighted, even though they entered into the estimate of the risk. The same particularity of description was not required in regard to the latter as in regard to the former.

The court, then, committed no error in permitting the jury to inquire whether stoves are necessary and customary in carpenter's shops, and in holding that, if they are, the representation sufficiently informed the company that the risk which they took might be affected by stoves in this carpenter-shop. And if the jury found that the use of stoves in such a building is an ordinary and customary use, and consequently, that the plaintiff, by not having specifically mentioned that they were used in this adjacent shop, was guilty of no fraudulent concealment, or breach of his warranty, then the risk undertaken by the defendants embraced the hazard consequent upon the presence and use of stoves there. That hazard the plaintiff might not increase, and still avail himself of his policy. The court submitted to the jury to find whether he had increased it, whether the substitution of the steam-engine for the stoves enhanced the risk; instructing them that if it did, the plaintiff could not recover, and if it did not, he could. In this we see nothing erroneous. Whether a risk has been increased or not is a question for the jury, not the court: *Grant v. Howard Fire Ins. Co.*, 5 Hill, 10. The representation, even though it be made a warranty, does not bind the assured that there shall be no alteration, however immaterial to the risk, in the thing insured, or in its use. Although a strict and literal compliance with the terms of warranties be necessary, still the warranty is construed according to its ordinary meaning: *Shaw v. Robberds*, 6 Ad. & El. 75. While the risk is running, the assured can make no substantial alteration which enhances the liability of the insurer. But what is a substantial alteration? In fire insurance, it would seem to be, mainly, an increase of the risk: *Stetson v. Massachusetts Mut. Ins. Co.*, 4 Mass. 330 [3 Am. Dec. 217].

It was one of the conditions of the policy on which this suit was brought, that any alterations or repairs made in or about the premises insured must be made at the risk of the insured; not that they should necessarily avoid the contract,

but that the assured should assume the hazard of their increasing the liability of the insurer. The only remaining assignment of error is founded upon what the court said in regard to a portion of the evidence. It was as follows: "Evidence, however, was received of the conversation that occurred between the agent of the company and the plaintiff, at the time the application for insurance was made, in which the latter said that he expected to be from home much of the time, and that the shop would be but little used, though he 'might want to use it some, and that no fire would be in it.' But this was not communicated to the officers of the company, though it was that the insurance would be in the farmer's class of hazard, by which the premium would be considerably less than if in another class, and could not, therefore, have served as an item of consideration in the taking of the risk. Had the officers been informed of the conversation, and it had formed to any extent an inducement to the risk, a different aspect might be given to the case. But even this might be questionable, as it would be outside of what was written and proved the basis of the contract between the parties."

Certainly, if this conversation was not communicated to the company, it could have had no influence in inducing them to enter into the contract. The agent did, however, inform the company that it was a farmer's risk, but he did not testify that the information was given in consequence of anything the plaintiff said.

On the contrary, his testimony was, as appears by the judge's notes, that it was not on that account he made the communication. He testified: "I communicated to the company it was a farmer's risk—that there were no contiguous buildings—but nothing of the conversation I had with the plaintiff." "The shop, without fire in it, would not exempt the house from farmer's rates, which do not allow other buildings within eighty feet." It was the distance of neighboring buildings, then, and not the fact that they have no fire in them, which determined whether the risk was a farmer's risk or not. The plaintiffs in error, however, complain that the court expressed doubts whether, if the conversation had been communicated to the company, it would have made any difference, because it was outside of the written basis on which the parties contracted. If it could have had any effect in the supposed case, it would be, not because the declarations of the plaintiff were fraudulent concealments or misrepresentation,

but because they amounted to a promissory representation broken by him, a representation in addition to those contained in his written application. But by the provisions of the policy itself the addition of a parol promissory representation appears to be prohibited, and the rights of the parties made to depend upon the written contract alone. How this may be it is unnecessary to inquire; for the question is not in this case. The supposed case has no existence here, nor was it submitted to the jury; and consequently, any doubts expressed by the court below in regard to it could not have been hurtful to the plaintiff in error. None of the errors assigned are sustained, and the judgment is affirmed.

Judgment affirmed.

ALTERATION OF INSURED PREMISES, EFFECT OF ON CONTRACT: See *Padgett v. Providence M. F. I. Co.*, 67 Am. Dec. 496, and note 496.

THE PRINCIPAL CASE IS CITED IN *People's Ins. Co. v. Spencer*, 53 Pa. St. 361, and *Citizens' Ins. Co. v. McLaughlin*, Id. 490, to the point that if a building is insured with the knowledge and understanding that a certain business is to be carried on there, the fact that articles which are necessary and usual in such business are used there, though they would otherwise be considered as hazardous articles, will not avoid the policy.

DIAMOND v. LAWRENCE COUNTY.

[57 PENNSYLVANIA STATE, 353.]

LIS PENDENS IN EQUITY, NOT COLLUSIVE, AND DULY PROSECUTED, IS NOTICE to a purchaser so as to affect and bind his interest by the decree, and begins from the service of the subpoena after the bill is filed; and is no more than the adoption of the common-law rule in real actions, that if the defendant aliens after the pendency of the writ, the judgment will overreach the alienation.

DOCTRINE OF LIS PENDENS IS NOT CONFINED TO REAL ACTIONS, but is applicable to choses in action, other than commercial paper which has not matured.

PENDENCY OF SUIT BETWEEN COUNTY AND RAILROAD COMPANY, in regard to bonds issued by the county, in payment of its subscription to the company's stock, is notice to all the world of the facts alleged in the pleadings therein, and the purchasers of such bonds from the company *pendente lite*, and all subsequent purchasers, are affected by the decree of the court in the suit pending at the time of the purchase.

MUNICIPAL BONDS IN AID OF RAILROAD ARE NOT COMMERCIAL PAPER in Pennsylvania, and even in the hands of innocent and remote purchasers are subject to the equities existing against them when in the hands of the first purchasers from the company, and the interest coupons are subject to the same equities.

PURCHASERS OF MUNICIPAL BONDS ISSUED IN AID OF RAILROAD are bound to take notice of the law under which they were issued.

PAYMENT OF MUNICIPAL-AID BONDS WILL BE ENFORCED ONLY to the extent of the money which they brought to the company.

DEBT. The opinion states the facts.

D. B. Kurtz, for the plaintiff in error.

L. Taylor and B. McComb, for the defendant in error.

By Court, **WOODWARD, J.** This case is here as a case stated. The plaintiff claims a judgment for the amount of a coupon accompanying bond No. 56, issued by the county to the North-western Railway Company, in part payment of the county's subscription to the stock of said company; which bond and coupon the company transferred to a contractor for work done on their road, and by several successive transfers the said bond and coupon came into the hands of the plaintiff for a valuable consideration. It is made a part of the case, that on the fifth of June, 1857, before the railroad company had transferred this bond, the county of Lawrence filed her bill in equity in the supreme court of Pennsylvania, against the railroad company and others, praying for an injunction upon the company against any disposition of the bonds of the county, and for a decree that said bonds be delivered up for cancellation. The subpoena issued, and was served before the company parted with this bond. On the fourteenth of March, 1859, this court made their decree in the said suit: *Lawrence County v. North-western R. R. Co.*, 32 Pa. St. 153; that the entire subscription of two hundred thousand dollars on the part of the county to the stock of the company be and the same was thereby annulled and set aside, without prejudice, however, to any rights which third persons may have lawfully acquired as purchasers of the bonds issued; and it was further decreed that the company restore to the county the two thousand dollars of bonds that remained on hand, and pay to the county one hundred and ninety-eight thousand dollars in satisfaction of the bonds they had sold and transferred.

The pleadings and proofs in that case exhibited irregularities in the making of the subscription, and conduct exceedingly dishonest on the part of the directors of the company in the use they made of the bonds. The court, however, held the subscription valid, but the sale of the bonds void, because sold at sixty-four cents in the dollar, in direct violation of the act of assembly under which they were issued. It was on this

ground, the illegal sale of the bonds below par, that the decree was founded: See the opinion of Lowrie, C. J., in *Lawrence County v. North-western R. R. Co.*, 32 Pa. St. 153. It is manifest from this statement that the bond now in suit was transferred by the company in contempt of the authority of this court. After the service of the subpoena in the equity suit the company had no authority, under any pretense whatever, to part with a bond. The directors, who were the governors of the company, were trustees of the stockholders. One of the largest of the stockholders had come into court on the equity side, and complained of fraudulent mismanagement of the corporation, of the illegal issue of the bonds to the company, and of the illegal disposition of a portion of them by the company. Of our right to take jurisdiction of such a case there can be no question. That our jurisdiction attached from the moment the subpoena was awarded is equally clear. Though no special or preliminary injunction was issued, it is apparent that if the company could, after service of subpoena, go on and sell bonds, they might defeat our jurisdiction altogether. I am not now speaking of the right of a purchaser from them, but only of their right to sell, and, under the circumstances of the case, we hold that the sale of bonds, after service of the subpoena in equity and before final decree, was an attempt to remove the subject of litigation beyond our jurisdiction, and so a contempt. Now as to the purchaser. Whether the purchaser of bond No. 56 is within the saving clause of the decree depends upon the question whether he is to be affected with notice of the equity suit. He, and all under whom he claims, purchased after the institution of that suit. Were their rights lawfully acquired?

The doctrine of *lis pendens* in this country is founded on Chancellor Kent's opinion in *Murray v. Ballou*, 1 Johns. Ch. 566, delivered in 1815. Winter, a trustee of lands, was sued in equity by his *cestui que trust* for breach of trust. Pending the suit, he sold part of the trust lands to Ballou without any actual notice of any breach of trust, or of any suit against the trustee, and for a full consideration, which Ballou paid. After full argument, Ballou was held to be a purchaser with notice, and was decreed to give up the land to the *cestui que trust*, or to pay for it again. "The established rule is," said the chancellor, "that a *lis pendens*, duly prosecuted, and not collusive, is notice to a purchaser so as to affect and bind his interest by the decree; and the *lis pendens* begins from the service of the

subpoena after the bill is filed." He added, "that it is no more than the adoption of the rule in a real action at common law, where, if the defendant aliens after the pendency of the writ, the judgment in the real action will overreach such alienation." It was one of the ordinances of Lord Bacon (see his works, vol. 4, p. 511), laid down for the better and more regular administration of justice in the court of chancery, that "no decree bindeth any that cometh in *bona fide*, by conveyance from the defendant before the bill exhibited, and is made no party, whether by bill or order; but where he comes in *pendente lite*, and while the suit is in full prosecution, and without any color of allowance or privity of the court, there, regularly, the decree bindeth." In *Murray v. Lyllburn*, 2 Johns. Ch. 441, the principles asserted in *Murray v. Ballou*, 1 Id. 566, were held to apply to choses in action as well as to real estate, and to entitle a *cestui que trust* whose lands had been fraudulently disposed of by the trustee during a suit brought against him, not merely to the land itself, but to the mortgages or other securities taken for the purchase-money against purchasers or assignees claiming title under sales or assignments made while the suit was pending.

"The ground," said Chancellor Kent, "on which I place the right of the *cestui que trust* to pursue the bond and mortgage in the hands of the assignee of Winter is the constructive notice to all the world, arising from the bill and supplementary bill filed in 1809, against Winter, for a breach of trust." This he held to be agreeable to the doctrine that an assignee of a chose in action takes it subject to all the equity of the obligor, though not subject to latent equities residing in third persons against the assignor; but he made a doubt whether the rule of *lis pendens* was to be carried so far as to affect cash, negotiable paper not due, or movable personal property, such as horses, grain, etc., when received in payment for the trust estate. The doctrine laid down in these cases is said by Hare & Wallace, in 2 Lead. Cas. Eq. 123, to be generally adopted throughout the United States, both by courts of law and equity. And they cite *Griffith v. Griffith*, 1 Hoff. 153; *Jackson v. Ketchum*, 8 Johns. 479; *Harris v. Carter*, 3 Stew. 233; *Tongue v. Morton*, 6 Har. & J. 21; *Owings v. Myers*, 3 Bibb, 279; *Jackson v. Andrews*, 7 Wend. 152; *Lodge v. Simonton*. 2 Penr. & W. 439 [23 Am. Dec. 36]. To which I take leave to add *Bolling v. Carter*, 9 Ala. 921; *Choudron v. Magee*, 8 Id. 570; *Green v. White*, 7 Blackf. 242; *Walker v. Butz*, 1 Yeates, 574. The American

cases which have limited and qualified the doctrine of *lis pendens* as here stated will be found collected in a note to page 385 of Adams's Equity. The most material of these cases is *French v. Loyal Company*, 5 Leigh, 627, where it was held that the doctrine of *lis pendens* can only affect a purchaser from the party to the suit of the subject of controversy. This is a very material limitation, and would, if it were followed, save the plaintiff's case. But considering the peculiarities of this case, and especially the extraordinary notoriety which attended the equity suit against the railroad company, we think the rule is applicable here without that limitation. And according to the rule, the suit was notice to all the world of all the facts alleged in the pleadings, so that this plaintiff stands in no better situation for enforcing the bond against the county than the company themselves would stand. If we would not compel the county to pay the coupon to the company, for the reasons to be found in that suit, for the same reasons we will not compel them to pay the plaintiff.

It is argued that the bonds and coupons are negotiable instruments, and therefore, that this defense, like all others, is excluded. We have said, on several former occasions, that we will not treat bonds like these as negotiable securities. On this ground we stand alone. All the courts, American and English, are against us. Be it so. We are not insensible to the importance of this fact, nor are we wanting in deference to the learning and wisdom of the judges who differ from us. But we are a Pennsylvania tribunal, sitting in judgment on an occasional and extraordinary security for money created under Pennsylvania statutes. We know the history of these municipal and county bonds: how the legislature, yielding to popular excitements about railroads, authorized their issue; how grand juries, and county commissioners, and city officers were molded to the purposes of speculators; how recklessly railroad officers abused the overwrought confidence of the public; and what burdens of debt and taxation have resulted to the people. A moneyed security was created and thrown upon the market by this paroxysm of the public mind, and the question is now, How shall the judicial mind regard it?

According to the law merchant, the purchaser of negotiable paper takes it discharged of all equities betwixt the original parties, but the law merchant is a branch of the common law that is founded in the usages of trade and business among merchants. It is not a temporary, local, statutory system, but

a permanent and universal jurisprudence, having no root in any statute; the same thing, substantially, all over the civilized world, and its uniformity essential to the maintenance of the commerce of the world.

Why should these bonds be referred to that system of jurisprudence? They are temporary, and will never be repeated again whilst the world stands. They are local in their origin, issued by counties, cities, and boroughs here in Pennsylvania, not for ordinary indebtedness, nor for purposes which belong naturally to such municipalities, and they are rendered lawful only by a special and extraordinary exercise of legislative omnipotence. Unlike bills of exchange, they do not grow up out of the daily business of mankind, but are creatures of statute law. They generally recite on their face, or refer to, the authority by which they exist. They are called by the legislature "certificates of loans or bonds"—never notes or bills. They always bear a broad plain impress of a seal, which is the only test of their authenticity, and which, added to a bill of exchange, would instantly destroy its commercial character the world over. The only point of resemblance between them and bills of exchange is, that both are payable to bearer; but let it be remembered that any sealed instrument for money may be made to a particular payee, "or bearer," whilst no negotiable instrument can be made under seal. It may be added that the constitution of Pennsylvania has been so amended as to forbid a future issue of such bonds—a provision which nobody ever regarded as a blow at commercial paper. These are distinctions which justify any court in refusing to treat bonds of this nature as commercial paper.

But it is said the rights of innocent purchasers cannot be protected unless these distinctions be disregarded. I reply, the rights of innocent tax-payers cannot be protected if they are. No man can go over the history of these bonds and fail to see that there are two parties involved, both of whom are worthy of the regards of the judicial eye. On the one hand, there are the purchasers who have invested their money, generally at a large discount, but on the faith that the people whose representatives have issued the bond will see to its redemption; and on the other, there are the people whose representatives have hurried them thoughtlessly into oppressive indebtedness, without an equivalent.

Now, if equal justice is to be administered to both parties, no narrow and technical grounds can be assumed, and cer-

tainly the bond must not be treated as a bill of exchange. Nor can the coupon, for it is part of the same instrument, and is not of itself a complete contract. What, then, is equal justice both to purchasers and people in respect of these bonds? Seeing that the people have, at the least, permitted their accredited agents to issue them, and that some consideration was received for them in the stock subscribed, and in the progress of the work, there is reason in holding them bound to pay so much money on each bond as it brought into the treasury of the company. That money, whether honestly applied to the work or not, was honestly paid in, for the purpose of being so applied. For that money, when it falls due, and for the interest as it accrues, the county would seem, on all principles of equity and fair dealing, to be justly liable to the holder of the bond. But the holder ought not to have more than that money, because he, or others under whom he claims, purchased the bond of the company in violation of the only law which ever legalized the bond. It was forbidden to be sold under par, and all purchasers were bound to take notice of this. Generally, second and third and more remote purchasers pay less for such securities than the first purchaser from the company. So that when we give them the amount the first purchaser paid, they have nothing to complain of, except that the speculation turns out not quite as large as was intended. This, then, is our ground—enforcement of the bond to the extent of the money is actually brought the company, but no entanglements of communities in the meshes of commercial law, for the purpose of holding them liable beyond this extent. We intimated in *Thomas v. Commissioners of Alleghany Co.*, 32 Pa. St. 230, that this would be our ground when a case was presented in proper shape; and though no case has yet been presented, we have stood firmly against the tendency of the judicial mind everywhere else to treat these special and peculiar securities as bills of exchange. And we have maintained this position perseveringly, in order that we may the better administer even-handed justice to both parties.

This explanation of our position is necessary, as showing why we allowed the rule of *lis pendens* its natural and legal operation in this case. Diamond did not buy mercantile paper, but a bond—a bond that was the subject of a pending suit in equity—and therefore he purchased it with notice of all the facts of that record.

But the statement of our position on the above question bears

a more direct relation to one of the questions now before us. It is made a part of the case that the bonds were sold at sixty-four cents in the dollar, contrary to the act of assembly, and one of the questions submitted is, whether the plaintiff, if entitled to a judgment at all, would be entitled to a judgment for more than the bonds sold for. We decide that he is entitled to no judgment, because of the *lis pendens*; but that if he could recover at all, he could recover only the amount for which the company sold the bond.

It is not necessary for us to discuss the irregularities of the subscription made by the county, nor the authority of the county to make it. In the case of *Thomas v. Commissioners of Alleghany Co.*, 32 Pa. St. 230, the subscription was held to be valid, and we should doubtless reach the same conclusion again, if we were to review the whole ground. But because it is not necessary, we forbear to do it.

The judgment is affirmed.

LIS PENDENS, DOCTRINE OF, GENERALLY: See the extensive note to *Newman v. Chapman*, 14 Am. Dec. 774-779; and see *Shotwell v. Lawson*, 64 Id. 145; *Gosson v. Donaldson*, 68 Id. 723. The principal case is cited in *Kellogg v. Faneher*, 23 Wis. 26, to the point that the pendency of a suit between a railroad company and a county, in regard to the latter's bonds issued in aid of the former, is notice to all the world of the facts alleged in the pleadings.

NEGOTIABILITY OF MUNICIPAL-AID BONDS: See extensive note to *Morris Canal Co. v. Fisher*, 64 Am. Dec. 423-445; *Bank of Rome v. Village of Rome*, 75 Id. 272, and note 276. The principal case is cited in *Mercer County v. Hackett*, 1 Wall. 95, where the court refused to follow the decision in the principal case, that in Pennsylvania municipal-aid bonds are not negotiable securities. See the principal case cited with like effect in *New Albany L. & C. P. Road v. Smith*, 23 Ind. 355.

THE PRINCIPAL CASE IS CITED IN *Armstrong County v. Brinton*, 47 Pa. St. 370, to the point that payment of municipal-aid bonds will be enforced only to the extent of the money which they brought to the beneficiary.

CALDWELL v. COPELAND.

[87 PENNSYLVANIA STATE, 427.]

OWNERSHIP OF MINES, WHETHER OPENED OR UNOPENED, MAY EXIST distinct from the ownership of the surface, under a proper deed therefor.

POSSESSION OF SURFACE OF LAND FOR MORE THAN TWENTY-ONE YEARS does not carry with it the possession of minerals below it, where the title to the latter had been severed from that of the surface by deed.

TITLE TO MINES OR MINERALS, DISTINCT FROM TITLE TO SURFACE of land, may be shown by documentary evidence, or in the absence thereof or in opposition thereto, by proof of possession and acts of ownership under the statute of limitations.

OWNER OF SURFACE OF LAND SEEKING TO ESTABLISH TITLE TO MINE, by adverse possession under the statute, in opposition to a deed, must prove possession of the mine as such, independently of his possession of the surface.

TO TOLL RUNNING OF STATUTE OF LIMITATIONS IN FAVOR OF GRANTOR, against grant by deed, of privilege of mining coal, an entry to exercise the privilege must be made or authorized by some person having rights under the grant.

TRESPASS by William S. Caldwell against Thomas and John Copeland for an alleged breaking and entering on plaintiff's land and carrying away certain coal. It appeared on the trial that defendants made the entry complained of as the tenants or lessees of Bell and McClure, the grantees of one George Greer, who claimed the right to enter upon and take coal from the land constituting the *locus in quo*, under a deed from plaintiff's father. Plaintiff derived his title through his father, and also set up a claim of adverse possession as against defendant's lessor as to any right he might have had to take minerals from the land. It appeared in evidence also that Bell had entered, with Caldwell's knowledge, some years previously, and had worked a coal mine for three years without any denial of the right to work such mines. The remaining facts appear in the opinion.

Cowan, for the defendant in error.

By Court, **WOODWARD, J.** It is apparent from that part of the charge of the learned judge which is recited in the first error assigned that he made the title of Caldwell to the coal in dispute to depend altogether on the actual possession which Caldwell had maintained of the surface, and not at all upon his occasional entries to take coal, of which there was evidence. The judge's language was: "This actual possession of the surface carries with it the actual possession downward perpendicularly through all the various *strata*. The actual possession, therefore, was in the plaintiff."

This proposition would be unquestionable if there had not been a severance of the title to the mine right from that of the surface by the deed of the twenty-seventh of May, 1831, Caldwell to Greer. But it is not true that after such a severance, whether by reservation or grant, the possession of the surface is possession of the underlying mineral. That mines may form a distinct possession and a different inheritance from the surface lands has been long settled in England, as may be seen by reference to the cases cited in the two opinions here-

tofore delivered in this case, and reported as *Caldwell v. Fulton*, in 31 Pa. St. 476, 482 [72 Am. Dec. 760]; see also *Barnes v. Mawson*, 1 Mau. & Sel. 84.

It is a common occurrence in mining districts there, not only that the ownership of the soil is vested in one person and that of the mines in another, but there are frequently distinct ownerships of the minerals in the same land. Thus one person may be entitled to the iron ore, another to the limestone, a third to one seam or *stratum* of coal, and a fourth to a distinct *stratum*. Title to any of these minerals, quite distinct from the title to the surface, may be shown by documentary evidence; or, in the absence of such evidence, or in opposition to it, title to them may be made out by proof of possession and acts of ownership under the statute of limitations. The acts of ownership, however, which constitute possession and confer title must be distinct from such as are exercised over the surface: *Tyrwhitt v. Wynne*, 2 Barn. & Ald. 554; *Cullen v. Rich*, Bull. N. P. 102; and see the same case under the name *Rich v. Johnson*, 2 Stra. 1142. So entirely is a mineral right, after severance, a claim to land, and therefore not an incorporeal hereditament, that title to it cannot be acquired by prescription. Prescription lies only for incorporeal rights; not for land. It may confer a right to work a particular mine, as it may confer a right of way across another's estate, or a right to fish in another's waters; but the title to the mine itself, like title to land, must be made out by documentary evidence, or under the statute of limitations: *Wilkinson v. Proud*, 11 Mee. & W. 83, and the cases therein cited.

It used to be said that if a grant of mines be made without livery of seisin, the grantee would take only a power to dig and work them: Touch. 96. But now, by statute 8 & 9 Vict., c. 106, all corporeal hereditaments are declared, as regards the conveyance of the immediate freehold, to lie in grant as well as in livery. And from *Chetham v. Williamson*, 4 East, 476, and *Wilkinson v. Proud*, above cited, it would seem that the law was so, even before the statute was passed. The law of livery has never embarrassed our conveyancing in Pennsylvania. There is no more reason why mines in another's land, whether opened or unopened, may not be held by a deed duly acknowledged and recorded, than why land in its most ordinary signification may not be so held. In other words, mines are land, and subject to the same laws of possession and conveyance.

But whether Caldwell conveyed to Greer the coal mines in

his land, or only granted a license to enter and take coals, depended on the construction of the deed above referred to of the twenty-seventh of May, 1831, and that was carefully considered and fully decided in *Caldwell v. Fulton*, 31 Pa. St. 475 [72 Am. Dec. 760]. It was then held that the deed was not a license, but a conveyance of the fee of the mine—that it was a grant of land, and not of an incorporeal hereditament. That ruling is not questioned in the present case, and it is decisive against the plaintiff's action so far as it is founded on a possession of the surface. For no length of possession of the surface merely could divest the title granted by that deed. Adverse possession of the mine by the owners of the surface, for the statutory period, would avail as title, but the case was not ruled below on this ground, and therefore we do not consider whether the evidence made out such a possession in the plaintiff and those under whom he claims. On the ground assumed, that possession of the surface for more than twenty-one years was title to the mine, the court was clearly in error.

And in the second assignment, we think there was error. If there was no possession in Caldwell of the coal mine as a coal mine, and independently of his possession of the surface, then there could be no question of adverse holding to submit to the jury. As to his claim of the coal in opposition to his deed, this was not possession within the statute. At most, it was only evidence of a prescriptive right; and corporeal hereditaments, I repeat, are not held by prescription. If Bell's entry was not made "to exercise the privilege under the deed"—that is, if it were not in pursuance of the deed, and whatever rights it conferred—the answer given to the defendant's first point was right. No entry would toll the statute that was not made or authorized by some person having rights under the deed. But if it were an entry under and in pursuance of the deed, it would toll the running of the statute in favor of the grantor. The language of the learned judge in answer to this point was not quite as clear as we could have wished, but as we understand it, we see no error in it.

We say nothing about his reputed answer to the second point, because it is denied by the counsel for the plaintiff that such a point was propounded, or such an answer given, and the record does not prove them.

The judgment is reversed, and a *venire facias de novo* is awarded.

OWNERSHIP OF MINES DISTINCT FROM OWNERSHIP OF SURFACE: See *Caldwell v. Fulton*, 72 Am. Dec. 760, and cases cited in the note 768. The principal case is cited in *Knight v. Indiana etc. Co.*, 47 Ind. 110; and in *Pennsylvania Salt Mfg. Co. v. Neel*, 54 Pa. St. 17, to the point that such a distinct ownership can clearly exist; and in *Armstrong v. Caldwell*, 53 Id. 287, to the point that where it does so exist by deed, an exclusive and continued enjoyment of the service will not confer a title by virtue of the statute of limitations as to the mines or minerals.

STOCKDALE v. ULLERY.

[37 PENNSYLVANIA STATE, 496.]

COURTS IN GRANTING INJUNCTIONS ARE NOT RESTRICTED TO ACTS "CONTRARY TO LAW," but may also, at times, exercise this power to restrain acts contrary to equity.

COURT WILL INTERFERE BY INJUNCTION TO RESTRAIN PARTNER, holding notes for the benefit of the firm, from pawning or pledging them for his own private debts, as it is an act contrary to law, and a fraud on his partners.

BILL by the former partners of defendant, to restrain him or the Farmers' and Drovers' Bank of Waynesburg, from negotiating or using (except for the purpose of paying the firm's debts) certain notes which had been deposited by the defendant Ullery with the bank, as collateral security for his own debt; said notes being the property of the firm, and the proceeds of a sale by them through Ullery, of a piece of land owned by the firm. The remaining facts appear in the opinion.

Downey, Flenniker, and Wyly, for the appellant.

Black and Phelan, for the appellees.

By Court, LOWRIE, C. J. This court has never formally sanctioned the *dictum at nisi prius*, *Hagner v. Heyberger*, 7 Watts & S. 104, that no injunction can be granted to restrain acts contrary to equity; and this case shows plainly enough that we cannot properly do it; and several other cases show that our equity powers ought not to be regarded so strictly: *Wesley Church v. Moore*, 10 Pa. St. 280; *Kirkpatrick v. McDonald*, 11 Id. 393; *Yard v. Patton*, 13 Id. 282. Indeed, equity is so much a part of our law, that the word "law" often means both law and equity, or either.

These notes are in the name of Ullery, and in strict law he has the title to them, and may dispose of them as he pleases, and therefore his pledge of them to the bank for his own debt

was an act contrary, not to law, but to equity. But we do not so distinguish between law and equity. Though he had and held the notes in his own name, he held them for the benefit of the firm, and had no legal right to pledge them on his own account. That act was contrary to our law, and we ought to restrain the effectuation of the purpose of it. Besides, it was a fraud upon the rights of his copartners, and it would be a fraud in the bank to assist at it after they are informed of the circumstances, and on this ground it ought to be restrained, if the facts alleged be proved.

The bill is very defectively framed, but the general demurrer does not raise any question of formal defects, and they may yet be cured by amendments, if necessary. The bill shows the substance of a case, entitling the plaintiff to be heard in the equity form.

Decree reversed and demurrer overruled, and the cause is remitted for further proceedings.

ACTS CONTRARY TO LAW AS WELL AS ACTS CONTRARY TO EQUITY MAY BE RESTRAINED BY INJUNCTION: See *McGeorge v. Hancock S. & I. Co.*, 11 Phila. 604; *Lyon's Appeal*, 61 Pa. St. 17; *O'Hara v. Stack*, 90 Id. 491; as where the members of a partnership or association are about to use its property contrary to equity: *Unanget's Appeal*, 55 Id. 138; *Kisor's Appeal*, 62 Id. 435, all citing the principal case.

RHEA v. FORSYTH.

[57 PENNSYLVANIA STATE, 508.]

COURTS OF EQUITY WILL NOT USUALLY EXERCISE JURISDICTION over cases of private nuisance or disturbance of easements, where the complainant's rights are disputed, until he has established his claim in an action at law.

UNDER PAROL AGREEMENT BY OWNERS OF ADJACENT LOTS, dedicating an alley to the common use of the lots, and in pursuance of which the owners erect their buildings in reference to the alley, the easement becomes appurtenant to each lot, and is not defeated by the statute of frauds, and subsequent purchasers of the lots take the easement as an appurtenance.

BILL in equity. The opinion states the facts.

R. and S. Woods and C. Hasbrouck, for the appellant.

A. N. Miller and James I. Kuhn, for the appellee.

By Court, WOODWARD, J. This was a bill in equity to restrain and remove a private nuisance. The plaintiff claimed a right of way by means of a three-foot alley across the rear

of the defendant's lot, and he complained that the defendant had obstructed it by a permanent erection thereon. The district court, from which this appeal comes, refused a special injunction, and after the answer and proofs came in, dismissed the plaintiff's bill without prejudice, but without filing any reasons of record.

The question to which we have first turned our attention is as to the jurisdiction of courts of equity in cases of private nuisance and disturbance of easements—a question which does not seem to have attracted the notice of counsel at all. The remedies at law for nuisances are very ample. Those that are public may be removed by indictment, and such as are private may be redressed by an action on the case. And the party aggrieved by either a public or private nuisance may also abate or remove it by his own act, so as he commit no breach of the peace in doing it, nor occasion, in the case of a private nuisance, any unnecessary damage.

These legal remedies, however, can, at the utmost, only abate or afford compensation for an existing nuisance, but are ineffectual to restrain or prevent such as are threatened or in progress; and for this reason there is a jurisdiction in equity to interpose, if the fact of nuisance be admitted, or established at law, whenever the nature of the injury is such that it cannot be adequately compensated by damages, or will occasion a constantly recurring grievance: *Adams's Equity*, 485; *Fonblanque's Treatise*, 51; 2 *Story's Eq. Jur.*, secs. 925 et seq; 2 *Eden on Injunctions*, 269. This last writer, after discussing several adjudged cases under the head whether the court will enjoin without trial, concludes, at page 273, that whatever may be the actual jurisdiction upon this point, it is, however, certain that courts of equity are at present extremely unwilling to interpose without a trial at law; a question, therefore, has always arisen in these cases, whether the court will grant or continue an injunction till the trial. The American cases are very numerous to the effect that the right of the complainant ought to be admitted or established at law before granting an injunction: *White v. Booth*, 7 Vt. 131; *Shields v. Arndt*, 4 N. J. Eq. 234; *Caldwell v. Knott*, 10 Yerg. 209; *Hart v. Mayor of Albany*, 3 Paige, 213; *Reid v. Gifford*, 6 Johns. Ch. 19; *Biddle v. Ash*, 2 Ashm. 211. In this last case Judge King said a court of equity will interfere, and by injunction protect the clear rights of a suitor, derived either from contract or ancient possession, against a nuisance produced by the ereo-

tion of a building by his neighbor, which darkens his windows or destroys his right of way. In *Gardner v. Village of Newburgh*, 2 Johns. Ch. 164, Chancellor Kent said the interference of courts of chancery in such cases rests on the principle of a clear and certain right to the enjoyment of the subject in question, and an injurious interruption of that right, which, upon just and equitable grounds, ought to be prevented. And again in *Van Bergen v. Van Bergen*, 3 Id. 286 [8 Am. Dec. 511], it must be a strong and mischievous case of pressing necessity, or the right must have been previously established at law, to entitle a party to call to his aid the jurisdiction of this court.

From these and many more authorities which might be cited to the same effect, it is apparent that where the plaintiff's right has not been established at law, or is not clear, but is questioned on every ground on which he puts it, not only by the answer of the defendant, but by proofs in the cause, he is not entitled to remedy by injunction. It is not enough that he is able to produce some evidence of his right, when there is conflicting evidence that goes to the denial of all right. In a case so situated, the plaintiff should first establish his right in an action at law, and then come into chancery, if necessary, for the protection of the legally established right. When the emergency is pressing, and the injunction affidavits disclose a *prima facie* right in the plaintiff, the proper practice, I apprehend, is for the court to interfere by special injunction, and stay the defendant's hand until the right has been tried at law. If the plaintiff will not bring his suit at law within a reasonable time, or fails to maintain it, the special injunction can be dissolved. But if without unreasonable delay he succeed in establishing his right, the defendant can then be heard on his answer and proofs, and the injunction be dissolved or made perpetual, as may appear equitable and just.

In the case before us, the plaintiff rested his claim on two grounds: 1. The use and occupation of the alley by several occupants of adjacent buildings for more than twenty-one years; and 2. The joint dedication of several lot-owners of this alley, in 1849, to their common use. But both grounds were denied by the defendant in his answer, and there was conflicting evidence in regard to both.

It is not worth our while to go through and discuss the testimony, for the questions of fact ought not have been brought here for us to decide. Neither the equitable jurisdiction of the court below nor our jurisdiction can properly attach until the

plaintiff has established his right at law. Has the alley been in common use so long that the successors in the title may set up the presumption of a grant? If not, did the defendant dedicate it to the use of the plaintiff's lot? These are questions for a court and jury to decide in an action at law. If an unconditional dedication should be found, or a dedication on a condition that was void, we do not think it would be defeated by the statute of frauds and perjuries, though it was by parol, because by the act of dedication the alley became an appurtenant of the lot Rhea afterwards purchased, and he holds all the appurtenances of that lot, as he holds the lot itself, by a lawful deed. We have alluded to this point because it is expressly raised by the defendant's answer, but further than this we do not feel authorized to go into the case, for, as it is now presented, we decline to exercise jurisdiction over it.

The decree is affirmed.

COURT OF EQUITY WILL NOT INTERFERE TO PREVENT DISTURBANCE OF EASEMENT, unless complainant's right has been established at law: See *North Pennsylvania Coal Co. v. Snowden*, 42 Pa. St. 490, citing the principal case.

REID v. GRAY.

[37 PENNSYLVANIA STATE, 508.]

WHERE RESIDENT OF MISSOURI TRANSFERRED ALL HIS HOUSEHOLD FURNITURE to his wife, his subsequent acts in moving to Pennsylvania with his wife, and there contracting debts, would not defeat the wife's title as against such Pennsylvania creditors, unless it was shown that such transaction was intended as a fraud on them.

FEIGNED issue to determine the ownership of certain personal property levied on by the sheriff at suit of Gray & Farrar against J. J. Findlay, but which was claimed by James L. Reid, as trustee of defendant's wife. The remaining facts appear in the opinion.

B. Grant, for the plaintiff in error.

George De Camp, for the defendant in error.

By Court, LOWRIE, C. J. It is admitted that by the law of Missouri, the transfer by Findlay, while residing there, to a trustee for his wife, of all his household furniture, passed to her the title to the property. As a gift executed, it needed no consideration. It is admitted that our law of 1848 allows a

married woman to own personal property, acquired by her after marriage, free from liabilities for debts of her husband. Owning the property, therefore, in Missouri, she would still own it after moving into Pennsylvania. Shortly after the transfer the husband and wife returned to reside in this state, and shortly after that he contracted this debt. Does this haste of his in running into debt annul the title which the wife had before he ran in debt? We do not see how it can. Of course, this view leaves a door open for frauds upon creditors; but so long as the law exists, that allows a divided ownership of the family property, we cannot shut off its natural consequences. We cannot declare, as matter of law, that the transfer of title became void, because the husband ran in debt so soon afterwards. The matter and form of the transfer being lawful, as against creditors, they can avoid it only by showing that it was intended as a fraud upon them.

Judgment reversed, and a new trial awarded.

CASES
IN THE
SUPREME COURT
OF
RHODE ISLAND.

CHACE v. CHACE.

[6 RHODE ISLAND, 407.]

UNDER RHODE ISLAND STATUTE, CHILD BORN after the execution of his parent's will, and not provided for therein, shall inherit in the same manner as if no will had been made, and parol evidence of the intent of the parent at the time of executing the will is not admissible to defeat the child.

TRESPASS and ejectment. The opinion sufficiently states the facts.

W. H. Potter and Van Zandt, for the plaintiffs.

Bradley and Sheffield, for the defendants.

By Court, BRAYTON, J. The statute under which the question now submitted to the court in this case is raised provides, that "when any child shall be born after the execution of his father's or mother's will without having any provision made for him in such will, he shall have a right and interest in the estate of his father or mother in like manner as if his father or mother had died intestate, and the same shall be assigned to him accordingly:" Digest of 1844, p. 232, sec. 6.

The daughter, Clara Matilda Chace, was born to the testator after the execution of his will, and no provision is made for her in the will of her father; and the plaintiffs, who are heirs at law of the said Clara Matilda, claim that by the express and plain provision of the act she became entitled on the death of her father to the same share in his estate, real and personal, as she would have inherited had he died intestate.

Upon the face of this provision of the statute, such must be the necessary result. Taking this section of the act by itself, there is but one construction to be given to it, viz., that an after-born child, not provided for in the will, shall inherit in the same manner as if no will had been made; that as against him the will shall be inoperative; that such child shall not be thus disinherited. We cannot otherwise give effect to the words of the act. The statute requires, in order to defeat his claims as heir, not only that some provision should be made for such child, but that such provision should be made in the will of his parent. It provides, therefore, not only under what circumstances he shall inherit the will notwithstanding, but how those circumstances shall be made to appear, viz., by the will itself.

The defendants, who claim under the will to the exclusion of the after-born child, contend that parol evidence is admissible nevertheless to show that the testator intended that the will should operate according to its provisions, and did intend to leave such child unprovided for; and seeks to apply to this case a rule of law not controverted; viz., that when the law implies a revocation of a will from facts *dehors* the will, that revocation may be avoided by parol evidence of a contrary intent in the mind of the testator.

The argument here assumes that the statute provisions only make the omission to provide for such child in the will a fact from which to imply an intent in the testator to revoke. In reply to this argument, two suggestions may be made: first, that the will is not revoked by the birth of such child. The act does not provide that it shall be, nor is it in any case entirely defeated in its operation, except where the child so born is sole heir. If there be other children, all the devises take effect, except so far only as to let in such after-born child to his share of the inheritance. The will stands and goes to probate, and it is another question how much estate passes by it. But, secondly, it may be said that this provision of the act does not profess to frame a rule of evidence, but to declare a rule of law. It provides that in a certain event, a child not provided for in the will shall inherit notwithstanding the will, and a share of the estate shall be assigned to him. The case of *Marston v. Fox*, 8 Ad. & El. 14, was a case where the will was claimed to be revoked by the marriage of the testator and birth of a child after the making of the will. In that case, if there was any revocation, the whole will was revoked as to all

the objects of the testator's bounty. Parol evidence was offered to show that the testator did not intend that the will should be revoked by the marriage and birth of issue. The opinion of the court was delivered by Tindal, C. J., rejecting the evidence; and upon the ground that the will was not revoked from any implied intent to revoke, but that the revocation was the result of a rule of law; and that where it appeared that the will was executed before the marriage and birth of issue, and such issue was left unprovided for, either by the will or otherwise, the will became revoked by a tacit condition annexed to it when executed; that the revocation took place in consequence of such rule of law, independently of any question of intention of the party himself, and therefore that parol evidence of acts, conduct, or declarations of the testator leading to the inference that he meant the will to stand, was not admissible to rebut the presumption of revocation. There was, in fact, no presumption of intent to be rebutted. Is an express statute provision less a rule of law or more a rule of evidence? Is the rule that marriage and birth of a child revokes a will more express than this rule prescribed by the statute?

The cases cited by the defendants from the adjudged cases in Massachusetts, properly considered, do not support the position taken by the defendants. Their statute, passed in 1784, provides that "any child or children, or their legal representatives in case of their death, not having a legacy given him, her, or them in the will of their father or mother, shall have a proportion of the estate of their parents assigned to him, her, or them, as though such parent had died intestate, provided," etc. In the cases of *Terry v. Foster*, 1 Mass. 146 [2 Am. Dec. 6]; *Wild v. Brewer*, 2 Id. 570; *Church v. Crocker*, 3 Id. 17; *Wilder v. Goss*, 14 Id. 359, decided under this statute, it was held that if it appeared from the other parts of the will that the name of the child was not omitted from accident, forgetfulness, or mistake, but by design, the will should, though no legacy were given to the child, be carried into effect, and the child omitted should not inherit, and that such was the intent of the legislature. But in no one of these cases, nor in any case prior to the revised statutes of 1836, was it held that evidence *aliunde* the will could be admitted to show the intent of the testator to exclude the child, and they all assume that it was inadmissible. In *Tucker v. Boston*, 18 Pick. 162, the supreme court of Massachusetts, by Shaw, C. J., who delivered the opinion of the court, express a strong doubt of the

propriety of even those decisions, as the reasonable and true construction of the statute; but say, "whatever we might have thought, if now first called upon to expound the statute, the construction has been too long and uniformly adopted and settled as a rule of property to be safely overturned." In *Bancroft v. Ives*, 3 Gray, 367, the reason for these decisions is intimated, as influenced by the preamble to the act, in substance the same passed in 12 Wm. III. The preamble is there recited, setting forth the then existing evil which the legislature designed to remedy. The preamble was: "Whereas, through anguish of the deceased testator, or through his solicitous intention, though in health, or through oversight of the scribe, some of the testator's children are omitted, and not mentioned in the will, many children also being born after the making of the will, though in the life-time of the testator."

With this clear expression of the existing evil, the court might well hold that it was sufficient to let in the heir against the will only in cases where it appeared from the will he was omitted by mistake, accident, or forgetfulness. We have no such light to direct us. Since these decisions, by the revised statutes of the state, this act has been altered and amended, and the proviso is added, "unless it shall appear that such omission was intentional, and not occasioned by any mistake or accident." The case of *Wilson v. Foster*, 6 Met. 400 [39 Am. Dec. 736], has been decided upon the added words; and it has been held that within this language, parol evidence, even, may be admitted to show that the testator did not intend to make provision for the child which had been omitted. Parol evidence was admitted, because, as the court say, the party claiming the distributive share did not claim under the will, but under the statute. In effect, the court hold that the words here prescribed a rule of law; and if it be made to appear that the omission was by design, the child should not inherit, depending upon the proof of such design; and as the act did not prescribe any rule of evidence, that question might be determined by any evidence which, by the general principles of evidence, would be relevant to such an issue. The statute leaves nothing to implication in the sense claimed by the defendants. It provides, not impliedly, but in express language, that if the omission be by design, then by a rule of law the heir shall not be let in to inherit.

It is quite evident from a perusal of all these cases, both upon the original statute and as now amended, that were the

question now for the first time raised upon the original act, especially had the preamble of the original act been omitted, parol evidence would not have been admitted, nor any evidence to defeat the child omitted in the will; and that such an offer as was made by defendants in this case at the trial would have been rejected.

It does not seem to us that the purpose of our statute of wills, much less the main purpose of that statute, is, as suggested by counsel, defeated by giving this construction to its sixth section and excluding parol evidence of the testator's intent. It is true that all the provisions of this act, all its several sections, should be so construed as to give effect to each, and so far as may be, to make them all harmonize with the general purpose of the act. The argument assumes that the main purpose of the act is to grant the testamentary power to the parent to devise his estate away from his children, and give it to such others as he will, and that it is not to be presumed that the legislature intended to limit or restrain this power by confining it to such children as may then be born. Why is this not to be presumed when this is the language of the act? Why should we presume that the legislature did not intend what they so clearly express? The purpose of the act is not to give a parent an unlimited power. It is quite evident that it was designed to lay upon it many restrictions. The proviso of the first section begins with restricting the extent and duration of the estate to be created by the will. By the second section a further condition is imposed upon the power—that the will of the parent shall only have effect if it be expressed in writing, signed by the testator in the presence of three subscribing witnesses—notwithstanding the general power to devise to children or to others as he shall think fit. The sixth section is but another limitation upon this general power to devise to other than children, declaring that the inheritable share of an after-born child shall not be devised to others, unless some provision shall be made for such child in the will which devises it away. This cannot be deemed an unreasonable restraint upon the power conferred by the first section: The parent is at liberty, so far as it respects all his children born at the time of executing his will, whose character, disposition, powers, and necessities, and probable wants, and what claims they may have upon him, may be supposed to be known to him, to devise what would otherwise be inherited by them to others; either with a view to their obedience and

proper government, or to what he may deem best for them. There is certainly much less reason for allowing a parent to disinherit, and leave utterly unprovided for, a child of whose claims upon his justice, as well as his bounty, whose wants and necessities in life, from the nature of things, can neither be known or foreseen. At any rate, it is not so unreasonable a restriction upon the power of devising that it should lead us to presume that it was not intended by the language used.

It is urged in the argument in favor of the admission of the parol evidence to establish the intent of the testator, that the admission of such evidence will not interfere with the statute of frauds, and that the evidence does not conflict with the will, and is only intended to confirm it. So far as the evidence offered by the defendants goes, it is offered in support of the will. We cannot suppose that a legislative body would allow evidence to be given by one side only upon any question depending upon evidence; and it is not pretended in this case that they did so intend. If they did not, then is the question open to proof, which must necessarily contradict the will, and show that the intent of the maker of the will was not what is expressed in the written language; and because this result would follow, the court, in *Marston v. Fox*, 8 Ad. & El. 14, excluded the evidence to prove or disprove such intent. We think the reason assigned entirely satisfactory, and a sufficient answer to the position of the defendants.

Upon the whole, we are of opinion that by the terms of the sixth section the legislature intended to and did prescribe a rule of law, that if an after-born child is not provided for at all in the will, he shall be let into his share of the inheritance, and that without regard to the will or intent of the parent; and that therefore no evidence of such intent is admissible to defeat the child.

The motion for a new trial in this case must be overruled, and judgment entered for the plaintiffs for possession.

PAROL EVIDENCE TO SHOW INTENTIONAL OMISSION OF CHILD IN WILL: See *Wilson v. Foster*, 39 Am. Dec. 736, and note 743, 744, citing the principal case; see also 1 Jarman on Wills, 274, 275, 718, and 727, also citing the principal case. A case very similar to the principal one, and maintaining a similar doctrine under the state statute, is that of *Potter v. Brown*, 11 R. I. 232.

RIGHTS OF CHILD OMITTED FROM WILL: See note to *Wilson v. Foster*, 39 Am. Dec. 740; also *Doane v. Lake*, 52 Id. 654.

BARROWS v. KNIGHT.

[6 RHODE ISLAND, 494.]

DESIGNED IMITATION OF TRADE-MARK, whereby one is enabled to fraudulently pass off his goods in the market as those manufactured by another, to the latter's injury, renders the former liable for any injury sustained. Such imitation may consist in the appropriation of the words "Roger Williams" from a trade-mark known as "Roger Williams Long Cloth."

WHETHER PARTIAL IMITATION OF TRADE-MARK by one was designed, calculated, and effectual to carry out a fraud upon another, is a question upon the evidence for the jury.

THE opinion contains the facts.

Hart, for the plaintiff.

Markland, for the defendant.

By Court, AMES, C. J. It never could have been a question that a designed imitation by the defendant of the trade-mark of the plaintiff, whereby the former fraudulently passed off his goods in the market as goods manufactured by the latter and to his injury, would support an action. Indeed, such a concurrence of fraud and injury constitutes the most flagrant form of this species of wrong; and this court can, with no justice, be said to have intimated the contrary, when it recognized in *Davis v. Kendall*, 2 R. I. 570, that equity would restrain the invasion of a trade-mark as well when the consequence of mistake as when contrived of fraud. The declaration before us charges the defendant with the worst form of this species of tort—that he knowingly and fraudulently stamped his goods with the words "Roger Williams," in imitation of the trade-mark of the plaintiff, in order to denote that they were manufactured by the latter, and knowingly and deceitfully sold his cloth, so stamped, as and for cloth manufactured by the plaintiff, to the lessening of the plaintiff's sales and credit, as a manufacturer of cotton cloth.

It is argued, however, that the declaration does not set forth, in the name "Roger Williams Long Cloth," as applied by the plaintiff to distinguish cotton cloth manufactured by him, that which can legally be a trade-mark; since it is neither the name of the plaintiff, nor descriptive of the nature or qualities of the article manufactured by him, nor is it symbolical of either. We are not aware of any legal restriction upon a manufacturer's choice of a name for his trade-mark, any more than of his

choice of a symbol, so that the name be so far peculiar, as applied to manufactured goods, as to be capable of distinguishing, when known in the market, one manufacturer's goods of a certain description from those of another. "Roger Williams," though the name of a famous person long since dead, is, as applied to cotton cloth, a fancy name, as would be, so applied, the names of Washington, Greene, Perry, or of any other heroes, living or dead. It is quite as peculiar and significant, in such an application, as "Persian Thread," "Mexican Balm for Hair," "Vegetable Pain Killer," "Houqua's Mixture" for tea, or "Ethiopian" for stockings, or the numerous other fanciful names which have been treated as appropriate trade-marks: *Coats v. Holbrook*, 2 Sandf. Ch. 586, note of cases. Now, the declaration states that the plaintiff had long used this name, stamped upon his cotton cloth, to distinguish his cloth from cloth of the same description manufactured by others, and enjoyed great reputation with the public on account of the good quality of the goods by him manufactured, and made great gains by the sale of them. If this was so—and whether it was must be matter of proof to the jury—it is clear that the defendant had no right to defraud him of his profits or good name, by falsely and deceitfully passing off his own goods for those of the plaintiff, whether by verbal misrepresentations, or by imitating any mark put upon them by the plaintiff, by which the public could and were accustomed to identify them.

The declaration further alleges, in substance, that the defendant, well knowing the plaintiff's said mark, and for the purpose and with the effect of such deception, did stamp the words "Roger Williams" upon cotton cloth not manufactured by the plaintiff, and to his serious injury. Certainly under the rule, so well settled, that a partial imitation of a trade-mark, if calculated to deceive, will support an action, this is a sufficient allegation of an invasion of the plaintiff's rights. The court cannot, as a matter of law, decide that such partial use of the designation of his goods appropriated by the plaintiff was not designed, calculated, and effectual to carry out the fraud charged, and must leave that, as well as the prior allegation, to be settled upon the evidence by the jury.

The demurrer is therefore overruled; but under the agreement of the parties, suggested at the argument, the defendant has leave to withdraw his demurrer without costs and to plead over to the merits.

DAMAGES MAY BE AWARDED AGAINST PERSON who uses the trade-mark or name of another: *Taylor v. Carpenter*, 42 Am. Dec. 114, and note 116; see also *Partridge v. Menez*, 47 Id. 231, and extended note there on trade-marks, discussing the subject fully and at length, and citing the principal case at pages 290 and 296.

THE PRINCIPAL CASE IS CITED IN *Messerole v. Tynberg*, 4 Abb. Pr., N. S., 415, where it is said that "whenever a trade-mark is employed to designate a particular manufacture, whether the term used is a popular one, formed of words or symbols common to the world, or one expressly created for the purpose to which it is applied, and the manufacturer acquires reputation, and becomes valuable as an article of merchandise, an imitator thereof, for a kindred or similar manufacture, is presumed to intend wrongfully, and the burden rests upon him to show either that there is no property in the term or symbol, arising from priority of use for the article to which it has been applied, or that no deceit or injury can result from the imitation. And so where one has established a business or market for his goods and carries it on with a certain mark or under a given name, it is a fraud on him for some other party to appropriate the same mark or name, or with a slight deviation to assume the same in such manner as to induce parties dealing with him to believe that they are getting the same goods and dealing with the same person who has given them a certain designation or mark, and an infringement which will be enjoined will consist in the transposition of the trade-mark "German Sweet Chocolate" to "Sweet German Chocolate:" *Pierce v. Guillard*, 8 West Coast Rep. 232.

BRYAN v. BATCHELLER.

[6 RHODE ISLAND, 543.]

ELOPEMENT OF WIFE AND LIVING IN ADULTERY without reconciliation with the husband is no bar to a claim for dower under the law of Rhode Island.

DOWER. The opinion states the facts.

J. Tillinghast, for the demandants.

Hart, for the tenant.

By Court, BOSWORTH, J. The question arises in this case upon demurrer to the defendant's plea. The point raised is, whether elopement of a wife and living in adultery, without reconciliation with the husband, bars a claim for dower under the law of this state.

The statute of this state provides (R. S., c. 202) that the widow of any person dying intestate, or otherwise, shall be endowed of one full and equal third part of all the lands, tenements, and hereditaments, whereof her husband, or any other to his use, was seised of an estate of inheritance, at any time during the intermarriage, to which she shall not have relin-

quished her right of dower by deed, except in cases provided for in the twenty-first section of the chapter. The section containing the excepted cases provides that real or personal estate conveyed by deed, or devised or bequeathed by will, for the jointure of the wife, in lieu of her dower, to take effect in her own possession immediately upon the death of the husband, and to continue during her life, or in fee, determinable by such acts only as would forfeit her dower at common law, shall bar dower.

The statute, therefore, provides of what, and to what extent; the widow shall be endowed, and also by what acts, and by what means, she shall be barred of her dower.

It is claimed in this case that there is a forfeiture. There is no forfeiture, of such a character as is here set up, provided by the revised statutes. Such a forfeiture did not exist at common law; and the only ground on which it is now put is, that by the English statute of Westminster 2, it is enacted that elopement and living in adultery, without reconciliation to the husband, is made a forfeiture to bar the widow of her dower.

We do not think that such a bar to dower ever existed in this state, or that such a ground of forfeiture was ever recognized by our law. Statutes regulating dower were first passed in this state, or first appear in the digest of the laws, in 1798. Prior to that time, the statute of Merton had been introduced into the colony; and the statute of Westminster 2, *de donis conditionalibus*. The former of these was an English statute relating to dower; and the latter, a statute relating to estates upon condition. The counsel has fallen into the error of supposing that the whole of the statutes of Westminster 2 were adopted; whereas the enumeration referred to by him shows that only the statute *de donis*, which is the first chapter of those statutes, was introduced into our laws. It is chapter 34 of the statute of Westminster 2, 13 Edw., that makes provision for this forfeiture. It may at first seem singular that our law should be so regardless of what seems so just and reasonable a ground of forfeiture. The common law, however, did not regard elopement and adultery as a forfeiture, even where the parties were divorced, unless the divorce was *a vinculo*. A reason for this state of our law may, however, be found in the nature of our decree of divorce, which was, we believe, always, when for this cause, *a vinculo*. The statute of divorce was passed in 1748, while that of dower was passed in 1790; so

that the cause of forfeiture, under the statute of Westminster, was cause for divorce *a vinculo*, under our statute, since 1748. Under the statute of Westminster, a reconciliation and living with the husband, after the fact, would reinstate the wife in her right of dower; and if, after the fact was known to the husband, under our law, he took no steps to procure a divorce, as he might if he saw fit, by which his wife would be effectually barred of all right to claim dower in his estate, the wife seems always to have been left, by our law, in the same condition as she would be under the 34 Westm. 2, by a reconciliation and living with her husband. This plea must, therefore, be overruled, as no bar to the claim of the demandants.

ELOPEMENT AND ADULTERY OF WIFE, WHEN BAR TO DOWER: *Bell v. Neely*, 19 Am. Dec. 686, and extended note 686, citing the principal case; *Walters v. Jordan*, 57 Id. 558. For a decision similar to that arrived at in the case here reported, see *Labin v. Labin*, 2 Allen, 45; and see also 2 Scribner on Dower, 2d ed., 536.

CASES IN EQUITY
IN THE
COURT OF ERRORS AND APPEALS
OF
SOUTH CAROLINA.

EX PARTE NAYLER AND SMITH.

[11 RICHARDSON'S EQUITY, 289.]

CREDITORS' BILL.—EQUITY WILL ALLOW CREDITOR who has failed to present and prove his demand, before the day appointed in the order calling in creditors, to come in with his claim, at any time before the actual distribution of the assets, upon his contributing his fair proportion of the expenses of the suit; but the creditor is not entitled to protection if he is guilty of laches in filing his petition.

THE opinion states the facts.

De Treville and Pope, for the appellants.

Fickling, contra.

By Court, **WARDLAW, J.** In bills to marshal and administer the assets of embarrassed estates in the court of equity, commonly called creditors' bills, the practice is well settled to allow a creditor who has failed to present and prove his claim before the day appointed in the order calling in creditors, still to come in with his claim, at any time before the actual distribution of the assets, upon his contributing his fair proportion of the expenses of suit. This practice needs no vindication beyond that contained in the cases of *Shubrick v. Shubrick*, 1 McCord Ch. 406, and *Ex parte Hanks*, Dnd. Eq. (S. C.) 233. The petitioners who seek to intervene as creditors in the case of *McBride v. Kirk* make a case within his procedure. No final order for the distribution of the funds, much less no full distribution, has been made. Some of the assets are yet in the registry of the court, and the administratrix has in her

hands twenty or more slaves of the intestate estate, undertaken to be administered by the court. The *ex parte* order of May 11, 1858, that their guardian might remove the property of the infant distributees beyond the limits of the state, implies no actual distribution, cannot commit creditors, and cannot protect the administratrix. The petitioners offer to pay a fair share of the expenses.

This petition seems to have been filed about February 14, 1859. It prays that the petitioners may be allowed to prove their "claims *nunc pro tunc*, subject only to such legal and equitable grounds of objection as were valid against said claims on February 25, 1856," when the first report on debts was made by the commissioner. We think the petitioners are entitled to come in and prove their demands *nunc pro tunc*, in the sense that they shall not be barred by their mere failure to present their demands before the expiration of the time limited by the order. But we can afford no patronage or protection to laches. The chancellor says in his decree: "The petitioners' counsel declined to offer evidence that these claims had ever been presented to the commissioner or to the administratrix, or to the solicitor of the estate, nor was any evidence offered of the reasons for the omission."

The petitioners are not entitled to be saved from the consequences of the lapse of time before the filing of their petition.

It is ordered and decreed that the petitioners have leave to prove their demands as if presented February 14, 1859; and that the circuit decree be reformed accordingly.

O'NEALL, C. J., and JOHNSTONE, J., concurred.

Decree reformed.

CREDITORS' BILL, WHAT NECESSARY TO MAINTAIN: See *Edmeston v. Lyde*, 19 Am. Dec. 454; *Miller v. Davidson*, 44 Id. 715, and note 722; *Rice v. Barnard*, 50 Id. 54; *Chautauque County Bank v. White*, 57 Id. 442.

STATE BANK v. COX & Co.

[11 RICHARDSON'S EQUITY, 344.]

TRANSFER IS VALID WHERE OWNER OF BANK STOCK delivers a certificate thereof, with an indefinite power of disposition, in blank to her agent, who representing it as his own, transfers the certificate and power to a purchaser in the course of business as payment for a loan.

MADAME SZEMERE purchased fifty shares of stock in the State Bank of South Carolina, and received the following certificate:

"South Carolina. No. 5600. This certifies that Madame Leopoldine Szemere, née de Turkovics, Paris, is entitled to fifty shares in the State Bank, transferable only at the bank by the said Madame Leopoldine Szemere, nee de Turkovics, personally, or by her attorney. Witness the seal of the company and the signature of the president, at Charleston, this tenth day of July, 1852. Edward Sebring." Madame Szemere delivered to her agent, John Boldin, said certificate of stock, with an unlimited power of attorney in blank authorizing him to assign and transfer the stock in her name upon the books of the bank. Indorsed upon this power was the certificate of S. G. Goodrich, United States consul. Boldin, representing himself to be the owner of the stock, proposed to Cox & Co. that they make him advances thereon, he thereupon proposed to pledge to them the stock. They accepted, and Boldin sent them the certificate of stock and the power of attorney; they accepting his drafts, three in number, at three months, for four hundred pounds, two hundred and forty pounds, and one hundred and sixty-nine pounds ten shillings. They afterwards sold the shares, the proceeds of which are now in their hands. The chancellor held the shares to be the property of Cox & Co. to the extent of the consideration paid by them for the same. Madame Szemere appeals.

Pringle and Mitchell, for the appellants.

Memminger and De Saussure, contra.

By Court, JOHNSTONE, J. This case has been pressed upon the court as if the transfer of the scrip by Boldin was made in the character of agent, and by way of pledge; whereas, upon a careful examination of the facts, the scrip was represented and accepted as Boldin's own property: and it was a sale, and not a pledge. If the scrip was put into Boldin's hands by Madame Szemere under any restrictions, it was her duty to have proved what they were; but the only fact that bears on her transfer to him is, that she made a general delivery, with an indefinite power, in blank, before Mr. Consul Goodrich.

This, according to the general course of fair business, exhibited Boldin as the owner, and so he acted. Indeed, it appears that from that time he received the dividends, which was further proof of ownership.

The only formality omitted was that of filling up the blanks, and the taking out new scrip.

It is well known that courts of law as well as courts of equity, recognize the title of a person who purchases a security in the course of a fair business, although it be not negotiable. If, for instance, a note payable to A be transferred by him to B, the latter is recognized as legal holder of the paper, and although he may be obliged to use the name of A in suing for the debt, A will not be allowed to release the action. That the security is liable, in the hands of B, to the equities between the maker and the original payee may be conceded. That does not touch the point now under consideration, which exclusively concerns the property, the security itself, as between the original payee and one to whom he has transferred it without formal assignment. This morning the chief delivers an opinion, in the case of *Salas v. Cay*, 12 Rich. L. 558, that the assignment, comprehending not only tangible property but choses, enables the assignee to sue in his own name.

Whoever comes fairly by a security, as Cox did in this case, in the course of business, is entitled to hold it against him who passed it, or enabled another to pass it to him.

It has been argued that the inscription of Madame S.'s name in the scrip notified Cox of her right, so as to oblige him to inquire of her. But the plain authority was to transfer, which (no gratuity being reasonably intended) was a power to sell; and a sale was made. In a large proportion of cases, especially when such scrip is carried abroad, and considerable time has elapsed from the original issue, it has passed through many hands, so that the greater has been the efflux of time, the less reason has a buyer to suppose that the ownership remains in the original party, and the more insufficient is the guide for inquiry.

Boldin had been put in possession of this scrip, with an indefinite power of disposition, by Madame Szemere, and if he was not the owner (of which ownership there is much evidence), she exhibited him in a light which enabled him to lay claim to the stock. Under such circumstances, equity would not permit her to avail herself of the dry skeleton of title, which yet stands formally in her name, to defeat him whom she has contributed to deceive. The transfer should have been formally made; and this court will not take notice of that as undone which ought to have been done. It will, in all formal matters, execute agreements in good faith, and as they, in fairness, should be carried out.

It is ordered that the appeal be dismissed, and the decree affirmed.

WARDLAW, J., concurred.

O'NEALL, C. J., delivered a dissenting opinion.

Appeal dismissed.

BONA FIDE PURCHASER WITHOUT NOTICE of personal property from agent will be protected, where, although the agent is intrusted with possession for a special purpose, the principal has by his act or conduct allowed the agent to appear to the world as the true owner: *Carmichael v. Buck*, 70 Am. Dec. 226, and note 220, collecting prior cases in this series; and see also *Reynolds v. Witt*, 13 S. C. 14, citing and approving the principal case.

MILES v. WISE.

[11 RICHARDSON'S EQUITY, 584.]

EQUITY CAN PREVENT ASSERTION OF LEGAL RIGHT against plain equitable right.

PURCHASER OF EQUITABLE RIGHT from the distributees of a decedent, whose estate is free from debts, and upon which no administration has been had, will, in equity, be protected against an administrator afterwards taking out letters, and seeking to recover in an action of trover.

BILL in equity, alleging that on February 3, 1849, he purchased from J. Bird, H. G. Bird, J. Blackman, jun., and wife Ann, Mary Owens, W. Herrin and wife Maria, a certain negro woman Hannah and child Dick. That the above-named parties represented themselves as owners of the above-named slaves, under the will of their mother, Elizabeth Bird. That he continued in possession of said slaves until some time in 1858. But that defendant, in 1857, brought an action of trover to recover said slave Hannah and her children born since the purchase mentioned above. That said defendant, in 1857, obtained letters of administration upon the estate of one Alsfair Bird, who died intestate, unmarried, free from debt, and without issue in 1841 or 1842, and from whom said Elizabeth Bird acquired said slave Hannah.

Inglis, for the appellant.

Dargan, contra.

By Court, O'NEALL, C. J. In this case, I concur in the decree of the chancellor.

The single question presented by the grounds of appeal is, "that the court of equity has no jurisdiction in the premises."

The court of equity has jurisdiction to prevent the assertion

of a legal right against a plain equitable right. This principle is as old as the court, and has been asserted and carried out in innumerable cases.

Here, the party complainant is in possession under a purchase from the alleged distributees of the deceased nine years before the administration of the defendant. This intestate died seventeen years before the grant of administration. She was in her life-time unhealthy and idiotic, and at her death was free from debt, as alleged in the bill. Taking this case, it is plain that the complainant has made out a case entitling him to the relief of the court of equity. The case of *Marsh v. Nail*, Rich. Eq. Cas. 115, is a conclusive authority in his favor.

But it is supposed that *Brown v. Dickinson*, 10 Rich. Eq. 408, stands in his way. I do not think so. In that case, the complainant's right depended upon a deed which was supposed to constitute a separate estate in Mrs. Sessions, his grantor. The bill sought a discovery of that which he did not obtain. That closed the court of equity against him; and the case was properly left for the law court. There is no such difficulty in this case.

The defendant's answer sets up no debts; after a lapse of seventeen years, and from the condition of the intestate, the presumption is she owed none. The only contest set up is as to the legitimacy of two of the children of Arthur Bird and Elizabeth, his wife (sister and brother of the intestate). This question cannot be tried in the action at law; it must be tried in the court of equity, where the case is brought by the complainant. There can be no propriety, under these circumstances, of allowing the defendant to litigate at law and disturb the complainant's possession. The circuit decree of Chancellor Dunkin is affirmed.

JOHNSTONE and WARDLAW, JJ., concurred.

Decree affirmed.

EQUITY WILL SUSTAIN EQUITABLE TITLE against a legal title: *Hunt v. Turner*, 60 Am. Dec. 167.

EQUITY WILL PROTECT PARTY CLAIMING TITLE FROM INTESTATE by reason of adverse possession, as against an administrator seeking to recover, where the interests of the heirs have been conveyed or are barred, and there are no creditors of the estate: *Jonekin v. Holland*, 50 Am. Dec. 414.

**COLUMBIA BUILDING AND LOAN ASSOCIATION v.
BOLLINGER.**

[12 RICHARDSON'S EQUITY, 124.]

CONTRACT OF LOAN ASSOCIATION IS USURIOUS when it sells to one of its members its cash funds at a premium, giving one thousand three hundred dollars, and taking a bond secured by mortgage for two thousand dollars, bearing six per cent interest, and payable in monthly payments of twenty dollars each.

THE Columbia Building and Loan Association was organized to accumulate a fund to be loaned to its members. Each stockholder was a member, and paid one dollar per month on each share held by him; when funds were accumulated, they were to be loaned to the highest bidding member. At a sale of the funds defendant became the purchaser. The substance of the contract entered into by him is stated in the opinion. Failing to make payments according to his agreement, the association brought suit for the amount due, and to foreclose a mortgage given as security. Defendant pleaded that the contract was usurious. The chancellor held that it was not. Defendant appealed.

Bauskett, for the appellant.

Arthur and Tally, contra.

By Court, O'NEALL, C. J. The single question presented by this case is, whether the contract is or is not usurious.

Had it not been for the chancellor's decree, and the cases to which he has referred, I should not have entertained a doubt as to the usurious character of the contract.

The contract, in the beginning, allowed a discount of seven hundred dollars, on an advance of one thousand three hundred dollars, which was called a purchase of two thousand dollars of the funds of the corporators, at the premium of thirty-five per cent. This sum of two thousand dollars, and interest at six per cent, was to be repaid, in sums of twenty dollars, at the end of each month succeeding the fourteenth of December, 1854, the date of the bond. These were the provisions of the bond. Before the second Monday of December, 1854, the defendant had made thirty-two monthly payments, amounting to three hundred and twenty dollars. After the execution of the bond, the monthly payments required by its condition were duly made until November, 1856. This constituted a further sum paid of four hundred and sixty dollars. The actual pay-

ments on the loan, or advance, amounted to one thousand four hundred and eighty dollars, one hundred and eighty dollars more than the sum loaned, or advanced.

How the contract, which has thus earned more than the principal in a period of little more than four years, can be anything else than usurious, "the taking, directly or indirectly, above the value of seven pounds for the forbearance of one hundred pounds for one year," is difficult to conceive. Indeed, it must task and has tasked human ingenuity, in every tribunal where the question has been presented, to find the reasons whereby such a contract could be sustained.

The case of *Silver v. Barnes*, 6 Bing. N. C. 180, S. C., 37 Eng. Com. L. 335, seems to have been the beginning where the doctrine was sustained that such a contract was not usurious. That case was put by the circuit judge upon the ground that it was a mere advance of partnership funds. How that could have sanctified such a contract I cannot perceive. For it was as much usury to receive more than seven per cent on such an advance as upon individual funds. The court of common pleas, on an appeal, placed their judgment on the ground, whether it was an advance of partnership funds, or an usurious loan, was a question for the jury, and their verdict, that it was an advance of partnership funds, was sustained, as conclusive. I think it was a decision against law, even put in that point of view. For it still was contaminated by usury, if it was even a partnership fund. It was the taking more than legal interest for the forbearance of money. That case has been the foundation of all the subsequent cases in England, Connecticut, and Georgia. Here it is to be decided for the first time, and I rejoice that we are not bound by any previous adjudication. The case of *Bibb County Loan Association v. Richards*, 21 Ga. 592, was placed upon the ground that the charter had adopted the constitution and by-laws of the association as part of the law by which it was regulated, and the charge, being according to it, could not be illegal. This was the view of Lumpkin, J., followed by Benning, J., who hold that the association had followed the charter, and therefore they were entitled to recover. McDonald, J., dissented, and took, it seems me, the true view, that more than legal interest being charged and received for the forbearance of money, the contract was usurious.

In the case before us, the constitution and by-laws were not adopted as part of the charter. By the third section of the

charter, the corporation is authorized to make "any such rules and by-laws for their government as are not repugnant to the constitution and laws of the land."

The by-laws which authorized the contract before us cannot of themselves sustain its validity. If the contract be contaminated by usury, it must fall, and with it the by-laws, as contrary to the law of the land.

By the second section of the by-laws it is provided, "whenever the funds in the treasury shall warrant it, one or more advances shall be disposed of to the highest bidder, provided the same be not sold under par, and be secured by real estate fully equal in value to the sum advanced." Under this section, two thousand dollars were bid in by the defendant, at a premium of thirty-five per cent, and under the third section, "any stockholder taking an advance shall allow to be deducted the premium offered by him or her;" the premium, seven hundred dollars, was deducted. For what was such a premium deducted? Beyond all doubt, it was not for the privilege of buying. But it was for its consequence, the use of the money, which was to be repaid by installments of twenty dollars per month. That, beyond all doubt, was for the forbearance of money, and is necessarily, under our law, usurious. The contract made under the third and fourth sections provides ample security for the payment of the money, in the mortgage of real estate of equal value, and the assignment of stock in the said corporation. There is, therefore, no risk to increase the premium. By the fifth section, the defendant is bound to pay interest at six per cent on the amount bid in, and by the seventh section, for the failure to pay his dues to the association for three months, the directors may compel the payment of principal and interest, by instituting proceedings at law, or in equity, on the bond and mortgage. I am therefore clear that the contract in this case is a plain attempt to evade the usury law.

By the act of 1831, which altered the law in relation to interest and usury, and repealed the penalties of the act of 1777, it is in the second section provided "that every person lending or advancing money or other commodity upon interest shall be allowed to recover, in all cases whatsoever, the amounts or value actually lent and advanced; and that the principal sum, amount, or value so lent or advanced without any interest shall be deemed and taken by the court to be the true legal debt, or measure of damages, to all intents and purposes whatever,

to be recovered without costs." Under this provision, the corporation will be entitled to recover the sum actually loaned, deducting the payments made. The result will be that one thousand three hundred dollars will be the principal, on which payments to the amount of one thousand four hundred and eighty dollars have been made; so the corporation has been overpaid one hundred and eighty dollars. The consequence is that the complainant's bill must be dismissed.

It is therefore ordered and decreed that the chancellor's decree be reversed, and that the bill be dismissed, with costs.

JOHNSTONE, J., concurred.

WARDLAW, J., was absent, and gave no opinion.

Decree reversed.

CONTRACT WHICH IMPOSES LOSS ON BORROWER, in addition to the amount lent and lawful interest, whatever form it may assume, is usurious: *Clague v. Creditors*, 20 Am. Dec. 300; see also *Reynolds v. Carter*, 37 Id. 642, and note 645; *Baughler v. Nelson*, 52 Id. 694. In *Mechanics' and Farmers' Building and Loan Association v. Dorsey*, 15 S. C. 462, a case almost identical in every respect with the one here reported, the principal case is cited, approved, and followed.

CASES AT LAW
IN THE
COURT OF ERRORS AND APPEALS
OF
SOUTH CAROLINA.

BEAD v. McNULTY.

[12 RICHARDSON'S LAW, 445].

INSTRUMENT IS NOT PROMISSORY NOTE under the statute of Anne when it consists of a promise to pay money to a party or order, at a certain place, "with exchange on New York;" because, in order to constitute such note, the promise must be fixed and absolute.

PROMISSORY NOTE UNDER STATUTE OF ANNE must be an engagement to pay a definite sum of money, or a sum which, if not defined, may be ascertained by the law alone, without resort to extrinsic circumstances.

ASSUMPSIT on instruments containing promises to pay money to certain parties, or order, at a certain place, and for value received, "with exchange on New York." These instruments were declared on simply as promissory notes. The court held that the instruments declared on were not promissory notes, and ordered a nonsuit. Plaintiff appeals.

Wilson and Simonton, for the appellants.

R. Dozier, contra.

By Court, **JOHNSTONE, J.** Though the instruments, if properly declared on, might have been supported as common-law instruments, it was error to declare on them as promissory notes under the statute of Anne.

A promise, under that statute, must be an engagement to pay a definite sum of money, or a sum which, if not defined, may be ascertained by the law alone, without resort to extrinsic circumstances. With regard to a promise of the former character there can be no difficulty. It is only in relation to promises of the latter description that any doubt can arise. A

man may engage to pay one thousand dollars with interest from the date; or he may bind himself to pay the interest of one thousand dollars, without more. These would be good promissory notes, because the law comes in and fixes the interest, and thus ascertains the amount to be paid as clearly as if it had been expressed *eo nomine et in numero*; and the sum to be paid cannot be mistaken or varied any more than if it had been thus expressed. The promise is fixed and absolute. But where terms are added obliging the party to pay "with exchange on New York," which is not constantly fixed by law, but fluctuates from day to day, with the changes of commerce, this, if the instrument be supported as a note of hand, is equivalent to saying that that is a good note of hand which imports a promise to pay one sum to-day and another to-morrow—a thing incompatible with the character of a commercial paper.

It is ordered that the motion be refused, and the appeal be dismissed.

O'NEALL, C. J., concurred.

Motion dismissed.

WHAT FORM OF INSTRUMENT does not constitute promissory note: See *Titte v. Thomas*, 64 Am. Dec. 154, and note 156; *Muselman v. Oakes*, 68 Id. 583, and note 584.

REQUISITES OF PROMISSORY NOTE ARE, that it be a written engagement by one person to another, to pay absolutely and unconditionally a specified sum of money at a time named: *Fruick v. Norton*, 55 Am. Dec. 56, and prior cases cited in note 59; *Hubbard v. Mosely*, 71 Id. 698.

THE PRINCIPAL CASE IS DISTINGUISHED in *National Bank v. Gary*, 18 S. C. 288, in this, that in the latter case the promise contained in the note was absolute and certain.

FOGARTIES v. STATE BANK. AMBLER v. STATE BANK.

[12 RICHARDSON'S LAW, 518.]

WHERE BANK DEPOSITOR DRAWS CHECK for a portion of his deposit in favor of a third person, and upon presentation payment is refused, the holder may recover of the bank the amount of the check, especially where the bank's charter provides that it "shall receive money on deposit, and pay away the same to order free of expense."

BANK RECEIVES FUNDS OF DEPOSITOR WITH TACIT ENGAGEMENT to pay them out to his order, or check drawn in his own favor, or in favor of third persons, upon the one condition of being notified of the existence of the check, in such manner as to free it from danger of being liable to pay the same amount twice.

ASSUMPT. The opinion states the facts.

McCready and Campbell, for the appellants.

Desaussure, *contra*.

By Court, JOHNSTONE, J. Edward W. Bancroft, having deposited money in the State Bank, drew in favor of these plaintiffs, severally, checks for portions of his deposits; and payment being refused by the bank, suits were brought against it by the plaintiffs. The circuit court having decided against their right to recover, this court is moved, by way of appeal, to reverse that judgment. The two appeals have been put on the same footing, and argued together, and are now to be decided by us.

The court is not insensible to the unusual importance of the points involved; and so far as its ability extends, has bestowed upon them a corresponding attention and consideration.

The question whether a depositor's check, drawn upon his funds actually in bank, entitles the holder, upon presentation, to maintain suit against the bank, has not hitherto been brought directly before our courts; nor are we aware of but one single decision upon it, either in this country or abroad. In the case of *National Bank v. Eliot Bank*, noticed in one of the law periodicals (5 Am. Law Reg. 711), this question was decided in the negative; but not without a dissent entitled to much respect; and after mature reflection, our own persuasion is that a contrary decision would have been better upheld by principle and by sound commercial usage and policy.

In the best conducted banking institutions, the well-recognized usage is this: when a customer deposits funds, the bank is understood to receive them with a tacit engagement to pay them out to his order, or check drawn in his own favor, or in favor of third persons, with whom he may have dealings. This is understood to be the bank's duty and engagement, incurred by the simple act of receiving the deposits as a consideration for its right to employ the money, and which it is to perform, upon the single condition of being notified of the existence of the check, in such manner as to free it from danger of being made liable to pay the same amount twice; that is to say, the checks take precedence according to the order of the notification.

In addition to the obligation arising from this mercantile usage, forming part of the law of the land, and of which

courts are bound to take notice, the charter of the defendant bank declares that it "shall receive money on deposit, and pay away the same to order, free of expense;" which direction must be construed in the light of the custom, or habit, and to mean that the bank shall pay to the depositor's order, not only when drawn in his own favor, but also when made payable to third persons.

Banks, by going into business, are understood to hold themselves out as having undertaken, and assumed upon themselves to be liable for, all that that business in commercial usage obliges them to do; and when they accept charters, their acceptance must be regarded as an undertaking to do what the charter commands; so that we are here presented, in a single view, with the scope of this defendant's duty, both from custom and charter; and at the same time with its own promise to do it.

This bank may, therefore, be considered to have promised Bancroft, when it obtained the custody of his money, that it would honor its checks by paying out the fund, either to himself or to other persons, as his checks might direct. When a draft under these circumstances comes to the bank, it comes as its own contract, made by it on the consideration of having received funds as the means of its fulfillment; and as between the bank and the holder of the check (when drawn to a third person), Bancroft is really the bank agent, empowered to give the order. The contract presented is the original personal promise of the bank itself.

These dealings in bank checks stand upon peculiar grounds. The exigencies of trade do not admit of the delays attending the process of acceptance, or arising from the efflux of days of grace. If these drafts are delayed; if the bank, being in funds, be at liberty to refuse payment—the inevitable consequence to the parties disappointed can be none other than such as the want of scrupulous punctuality always inflicts. The drawer's credit suffers; and it is well known that for this injury a depositor is entitled to his action against the bank.

We do not hear of a right of action on the part of the holder; but is not this very fact some incidental proof that his right is the money contained in the draft, and that his right of action is for the money, and not for special damages, for its non-payment?

But in contemplating the consequences of the bank's violation of its general duty, the disappointment of the holder is

not to be overlooked, though no special action lie for it, and he be left, as in other cases, to an action for the debt due him.

The holder is certainly affected, the whole commercial community, and every interest dependent on commerce (and that is every interest in the civilized world), is affected. These instruments pass daily from hand to hand, and perform good service in exchanges and settlements. The public confidence in them is of a twofold nature. It is, first, in the drawer. Is he of known character? One who habitually draws only upon real resources? Is it based, again, upon the certainty of bank usage? Is it a fixed rule of trade, that when in possession of a drawer's funds, the bank will, on no account, permit itself to withhold payment, if properly notified? These two things being fixed in the public mind, universal, undoubting confidence obtains.

As to the character of the depositor, men must judge of that for themselves. But as to the punctuality of banks, destroy it, and who shall calculate the consequences? It is for this reason that when their duty is ascertained, it is the duty of judicial tribunals to hold them to the exact and unvarying performance of it.

Now, having described the duty of the defendant bank, both under the *lex mercatoria* and under its charter, the question recurs, whether the plaintiffs, holding and presenting checks drawn by the depositor on his funds actually in bank, were entitled to recover the money which the bank refused to pay.

It is hardly necessary to observe that the money, when the order was drawn, belonged, of strict right, to Bancroft, the depositor; and had he demanded it to himself, the bank had no right to withhold it from him. It was his property, and had he, on refusal to pay it to him, brought suit, it would have been incompetent for the bank to set off demands not yet due against his claim. This is plain and familiar law.

It is not intended to go beyond the case, and say whether if at the time of the order Bancroft's debts had been due they might have been set off or not, either against himself or the holder of his check. The case requires no such speculative decision. What I intend to assert is, that demands yet to mature were no set-off either against Bancroft or his assignee. In reference to notes discounted by him in bank, the dependence of the bank was not upon his deposits; it was under no necessity, and had no right to count for its security upon the deposits. Its calculations should have been on the indorse-

ments of his notes; and it should have taken care that this security was good.

To return from this digression. Instead of drawing in his own favor, this depositor drew in favor of the plaintiffs; that is to say, he assigned to them such portion of the deposits as he deemed fit.

It is not perceived upon what principle the justice of the plaintiffs' claim to the thing assigned can be disputed.

I do not understand, indeed, that it is its justice that is contested; nor, strictly, is it their legal right to the fund which is denied. The thing disputed is its enforceability. The law is reproached with the doubt whether its technical rules do not interpose obstacles to the remedy which the right seems to require.

It is supposed that there is a want of privity between the bank and the holders of these checks which screens it from suit; that such privity is not established until the bank, over and above all that it has done, shall have assumed payment to the holders.

I apprehend this is a misconception and an unnecessary disparagement of the law.

It is enough if it appears that, *ex æquo et bono*, the plaintiffs are entitled, as between the parties to the suit and to the instrument, to the money. If so, an action lies for money had and received to their use.

I have said that an action might have been brought by Bancroft against the bank for the injury done his credit by refusing his check. And what does this prove but that (in a single breath) the refusal was wrong?—wrong to the plaintiffs, wrong to Bancroft, wrong on the part of the bank; an act which it was illegal to do—contrary to right. Can less be made of this than that the plaintiffs were *ex æquo* entitled to the money?

I refer to a passage in *Dunlop v. Silver*, 1 Cranch, 440, 443, appendix A, too long to be brought out here, in which there is an enumeration of cases in which the action for money had and received applies; and among them cases of a fictitious payee of a bill of exchange, where it was conceded there was a want of privity, yet the plaintiffs recovered in this form of action; and actions against stake-holders on the determination of wagers, when there was no higher privity than exists in this case; and when Lord Holt observed such was the mutability of the right that the right to the money was altered by the cast of a die.

In these cases there are counts for money had and received to the plaintiffs' use. Had there been an omission to insert them, the declarations might have been amended.

But as it is unquestionable that on the money counts the checks might have been given in evidence, that of itself, in my humble opinion, would have authorized a recovery on counts on the checks themselves had there been no others. For can it be vicious pleading to state, in a special way, the facts under cover of which you may recover on the general counts?

I now proceed to consider the plaintiffs' right to this money under the form of contract which was adopted, relinquishing all advantages arising from the doctrine *ex aequo et bono*. I think the bank has made a contract which, regarded as its own contract, makes it liable to a legal recovery by the plaintiffs.

Wherever one, by his own engagement (and I have shown what this of the bank is), promises to pay to the order of another, the person in whose favor the order is made may enforce the promise.

And in the case of *Weston v. Barker*, 12 Johns. 276 [7 Am. Dec. 319], where Bowen and Robbins made an assignment to Barker to collect the funds, and, after paying specified creditors, hold the residue subject to the order of the assignors: and it was held that Weston, to whom they ordered this balance to be paid, might maintain an action against Barker for it as money received to his use. Mr. Justice Thompson said: "It was not denied by defendant's counsel that the action would be supported, if an express promise to pay [meaning an express promise to Weston, such as was contended was necessary to constitute a privity with him] was proved. It appears to me," says he, "that the proof in this case establishes such a promise, according to the good sense and sound interpretation of the rule." The defendant "expressly engaged to comply with the condition mentioned in the letter." "The money has been, in fact, received by the defendant; and, according to the very terms of his engagement, was received as the money of the plaintiff, and not as the money of Bowen and Robbins, they having previously directed the same to be paid to the plaintiff." "It was considered," proceeds the judge, "in the argument that had the plaintiff been named in the declaration of trust as one of the persons to be paid, he could maintain this action. And where, in good sense and sound principle,

can be the difference, whether he was originally named, or subsequently designated, according to the terms of the defendant's undertaking? His express promise was to hold the balance subject to the order of Bowen and Robbins. As soon as such order was given, this promise attached, and inured to the benefit of the person named in such order." And the learned judge goes into an examination of cases and principles to sustain his conclusion; for which, I refer to his argument.

This case, *Weston v. Barker*, 12 Johns. 276 [7 Am. Dec. 319], stands upon a principle that, when fully understood and appreciated, is sufficient for the case before us; and it is this, that where one, in consideration of money to come into his hands, promises to disburse that money as he shall be ordered by him from whom he receives it, he thereby creates a contract, negotiable in its very nature, which puts him in privity with whomsoever in the world he may be ordered to make payment to, so that the promise is, according to the law merchant, made to that person, and he is bound by his promise to pay him.

This is a principle of inappreciable value; and when the law, from its ruder stages, has traveled up to it, it should never be suffered to lapse away again under the load of mere technicalities. These should be brushed away where they cease to be helps, and become mere incumbrances. The principle should be secured to society.

We have traces of the same principle in every-day life; daily administered in our courts, yet wonderful to say not fully perceived. The learned judge who dissented in *National Bank v. Eliot Bank*, 5 Am. Law. Reg. 711, points out some of them. Where a party offers a reward for lost or stolen goods, what obliges him to pay the restorer of his property but this very principle? Should he turn round and deny privity with him because he did not prophetically name him before, or make an *assumpsit* to him after he ascertained him, would the courts let him escape? No. And yet the only difference in principle between his case and that of Barker is, that his promise is founded upon the consideration of recovering his own property, and Barker's upon that of getting possession of the property of other persons. Both are to persons unascertained when the promise was made.

Whenever a contract is essentially of a circulating nature, going about as it were through society, to draw forth the exertions or the property of its members as it may encounter them here and there on the commercial arena, it carries its own con-

sideration and its own obligation with it, and forms a privity with the persons to whom it comes.

Long before the statute of Anne, as is shown in the instructive case of *Dunlop v. Silver*, 1 Cranch, 367, appendix A, the principle I have mentioned, the very principle of this case, was embedded, as the law merchant, in the laws of England; and was working its way through the noble chaos of the common law. Nothing but the sturdiness of Lord Holt (a mere speck on that great character) compelled the parliament to put in a statutory form what was law before: *Sheldon v. Hentley*, 2 Show. 161; *Dunlop v. Silver*, 1 Cranch, 430, and cases there cited.

It is believed to be incontrovertibly true that he for whose benefit a promise is made may maintain an action upon it, though no consideration (except in a commercial sense, as I have endeavored to explain it) pass from him to the defendant; nor any promise from the defendant to him. That simple position fully supports, in principle, the present case.

Commercial good, if not commercial necessity, seems to demand that checks be regarded, as they are in practice intended to be, as transfers of the fund assigned, and not as mere powers to receive the money.

It is ordered that the nonsuit be set aside, and a new trial be granted.

WARDLAW, J., concurred.

O'NEALL, C. J., delivered a dissenting opinion.

Motion granted.

CHECK, RIGHTS OF HOLDER OF: See extended note to *New Hope D. B. Co. v. Perry*, 52 Am. Dec. 449 et seq.; also that appended to *Matter of Franklin Bank*, 19 Id. 422, citing the principal case.

CHECKS ARE GOVERNED BY SAME LAW as inland bills of exchange: *Barbour v. Bayon*, 52 Am. Dec. 593; *Smith v. James*, 32 Id. 527; *Walker v. Geiss*, 33 Id. 60; *Barnet v. Smith*, 64 Id. 290, and note 296.

DEPOSIT IN SAVINGS BANK, who may demand: *Bass v. People's etc. Bank*, 71 Am. Dec. 59, and note 62. And on the subject of deposits generally, see note to *Matter of Franklin Bank*, 19 Id. 418 et seq.

SPARTANBURG AND UNION R. R. Co. v. DE GRAFFENREID.

[12 RICHARDSON'S LAW, 673.]

CONDITION.—PARTY MUST PAY AMOUNT SUBSCRIBED, where to induce an organized railroad company to construct its road upon a particular route he subscribes to a certain number of shares of stock, upon condition that the prescribed route should be taken, and the condition is complied with.

THE opinion contains the facts.

Thompson, for the appellant.

Gadsberry, contra.

By Court, O'NEALL, C. J. The leading mistake of the learned and zealous counsel for the defendant is in supposing that the subscription in this case was one under the charter, and before the company was organized, when in fact the company had been two years in operation before the defendant subscribed. The question was before the stockholders whether the Tinker creek or the Ridge route, between Tiger and Broad rivers, should be taken. To secure this latter route, the defendant subscribed eighty shares, two thousand dollars, upon the condition that that route should be taken. It was taken, and the road was built on that route. Ought not the defendant to pay his subscription? It seems so to me.

The case of *N. E. R. R. Co. v. Rodrigues*, 10 Rich. L. 278, is an analogous case. There the struggle was to secure the charter; persons, a committee, were sent out to secure the charter, by raising additional subscriptions. The committee supposed that each subscriber might forfeit his payment of ten dollars on his subscription, and thus free himself from the obligation; and one of the committee so stated to defendant, who subscribed. The court held he was bound, and Judge Whitner, delivering the opinion, said: "It cannot avail the defendant that the subscription was not made in the presence of the commissioners. . . . The fact of such a subscription created an obligation and promise to pay the further sums required according to the terms of the charter."

Here the promise was to aid a railroad already existing upon a route to be taken; if so taken, such a promise, on the performance of the condition, was binding. The consideration was certainly sufficient. Beyond the building of the road, on the prescribed route, nothing further was necessary to fix the liability of the defendant. He was not entitled to have calls

made for the payment of his subscription, as the original stockholders. But if he was, all the proof in the power of the party was given. The company was plainly entitled to interest at least from the time the work on the Ridge route was finished. The jury found no interest, and if the plaintiff was appealing, a new trial must be awarded. But they are content, and the defendant has no right to complain.

The motions in arrest of judgments, and for new trial, are dismissed.

JOHNSTONE and WARDLAW, JJ., concurred.

Motion dismissed.

CASES
IN THE
SUPREME COURT
OF
TENNESSEE.

WILLIAMSON v. SMITH AND WALKER.

[1 COLDWELL, 1.]

WHERE WORD IS OMITTED IN CONDITION OF SEALED INSTRUMENT, without which the condition is insensible, the court will supply or add the word to the condition, if the obvious meaning of the parties appears from other parts of the instrument.

BILLS AND NOTES SHOULD EXPRESS SUM FOR WHICH THEY ARE GIVEN IN BODY OF INSTRUMENT; but an omission of the sum will not be fatal, or render the instrument invalid, if the true amount can be gathered from other parts of the writing.

WHERE DEFECT IN STATEMENT OF SUM EXISTS IN BILL OR NOTE, the amount marked in the margin may be referred to for the purpose of removing any ambiguity in the language used, or to supply the amount where it is not stated in the body of the instrument.

WHERE AMOUNT IS LEFT BLANK IN BODY OF BILL OR NOTE, the holder may fill it up with the amount stated in the margin.

IF DISCREPANCY EXIST BETWEEN AMOUNT STATED IN BODY OF BILL OR NOTE AND AMOUNT STATED IN MARGIN, the former prevails; because the latter is only a memorandum, while the words used in the body of the contract are a part of the note.

PAROL EVIDENCE IS INADMISSIBLE TO SHOW THAT SUM STATED IN MARGIN OF BILL OR NOTE, and not the sum stated in the body thereof, is the one intended by the parties.

EVERY MATERIAL ALTERATION OF INSTRUMENT DESTROYS ITS VALIDITY; but an alteration making a bill or note conform to an agreement between the parties will not vitiate the instrument.

CONTRACTS ARE TO BE INTERPRETED BY ASCERTAINING REAL INTENTIONS OF PARTIES THERETO, according to their stipulations; but in the absence of stipulations, or where they are ambiguous, the true sense of the words used should be ascertained, and what ought to be implied, in order to give them their true and full effect. For this purpose custom and usage may be resorted to.

WHERE CURRENCY IN WHICH BILL OR NOTE IS TO BE PAID IS NOT MENTIONED, the law will presume it to be the currency of the country where

it is to be paid. But the intention of the parties is to be interpreted from the custom or usage of the place where the bill or note is made, if such a course can be adopted.

**UNDER CODE OF TENNESSEE, PARTY AGAINST WHOM JUDGMENT ON DEMUR-
RER IS RENDERED MAY PLEAD OVER AS MATTER OF RIGHT**, without waiv-
ing the benefits secured by his demurrer. Therefore the proper judg-
ment against him is *respondent oster*; and if he fails to plead over, a writ
of inquiry, if necessary to ascertain the damages, will issue immediately,
and be executed the same term. If the demurrer is without cause, terms
may be imposed, not to exceed the costs of the action. And if the judg-
ment or decree of the inferior court is reversed, the appellate court is
required to give such judgment or make such decree as should have been
rendered below, and to issue execution without a *procedendo*, except where
the damages to be assessed are uncertain, in which case the cause must
be remanded for further proceedings: See Code of Tenn. 1858, secs. 2396,
2397, 2398, 3167.

ACTION upon bill of exchange. Verdict for defendants, and
plaintiff appealed. The facts are stated in the opinion.

S. Y. Watson, for Williamson.

J. Knox Walker, for Smith and Walker.

By Court, **WRIGHT, J.** The action in this case is founded
upon a bill of exchange in the following words and figures:

"Exchange for 3000.

Memphis, March 19, 1860.

"Six months after date of this first of exchange (second
unpaid), pay to the order of Sam. P. Walker, three thousand,
value received, and charge the same to the account of (accept-
ance waived).

CORREY & Co.

"To H. W. CONNER & SON, New Orleans, La."

Indorsed: "SAM. P. WALKER."

The second of the set is in the same form, omitting also the
word "dollars" after the words "three thousand." William-
son, the indorsee and holder of this bill, sues Smith, one of the
drawers, and Walker, the indorser, describing it in the declara-
tion as a bill for the payment of three thousand dollars. The
defendants crave *oyer* of the bill, and set it out *in hæc verba*,
and demur to the declaration, and for cause of demurrer say
that the declaration does not truly describe the bill of ex-
change, nor is the same valid or of any legal obligation,
because of the omission of the word "dollars," as above
shown. The demurrer was sustained by the circuit judge,
and judgment given that the defendant go hence, etc.

This, we think, is erroneous. The legal effect of this writ-
ing is a bill of exchange for three thousand dollars, and it
was proper so to describe it in the declaration. In Story on

Promisory Notes, 5th ed., sec. 12, it is stated that a paper with the following words and letters, but omitting the word "dollars," has been held to be a good note, viz.: "\$300, for value received, I promise to pay H. & Co. three hundred"—citing *Sweetser v. French*, 13 Met. 262, and *Coolbroth v. Purinton*, 29 Me. 469. In *Kincannon v. Carroll*, 9 Yerg. 11-15 [30 Am. Dec. 391], it is held that where a word is omitted in the condition of a bond, without which the condition is insensible, if it appear from other parts of the bond what the meaning of the parties was, the court will supply or add the word to the condition. The authority cited in support of the opinion is the case of *Coles v. Hulme*, 8 Barn. & Cress. 568, S. C., 15 Eng. Com. L. 282, where a suit was brought upon a penal bond, the penalty being described as "seven thousand seven hundred," without any species of money being mentioned. It however appeared from the recitals in the condition that various sums expressed in pounds were agreed to be paid, and hence it was apparent that the parties intended to express the penalty also in pounds, and therefore the court said that in furtherance of the intention of the parties, the word "pounds" might be supplied.

The judgment must be reversed, and judgment pronounced here, that Williamson recover his damages; to ascertain which, the case will be remanded to the circuit court, where a jury will be impaneled to assess the same. The damages to be assessed will, of course, embrace whatever sum may be found due upon the bill of exchange, with interest, damages, and cost of protest.

We have been asked to reconsider the opinion delivered in this case, and have done so upon the authorities furnished by the counsel of defendants, and such other books as we have had within our reach. In the opinion, it had escaped our attention that the usual prefix of the dollar-mark to the figures 3000, in the margin of the bill of exchange, was omitted; an exact copy of the bill is this:

"Exchange 3,000.

Memphis, March 19, 1860.

"Six months after date of this first of exchange (second unpaid), pay to the order of Sam. P. Walker, three thousand, value received, and charge same to the account of (acceptance waived).

CORRY & Co.

"To H. W. CONNER & SON, New Orleans, La."

Indorsed: "SAM. P. WALKER."

The second, or duplicate of the bill, is a literal copy of the

first, with the variation of the words "second unpaid" and "first unpaid" in the body, and the figures 1 and 2 in brackets in the margin, to denote that one is the first and the other is the second of the bill of exchange.

The question now is, whether the legal aspect of this writing is to create a valid bill, and whether, if such an instrument be drawn, indorsed, and put in circulation for value, any recovery can be had upon it against the parties thereto by the holders. Can the court supply the omission of the word "dollars" at the end of the words "three thousand"? We have not been able to find a case precisely parallel with this. The nearest authority to it, perhaps, is *Elliott's Case*, in 2 East C. L. 951. An indictment for the forgery of a promissory note upon the Bank of England, in which it appeared that in the body of the note the promise was only to pay the sum of "fifty," the word "pounds" not being added in writing, as is usually done in such notes as have not the word "pounds" engraved therein, being calculated for the insertion of broken sums, but at the bottom of the note there was engraven £50. It also appeared on the face of the note that it was made in London, and payable generally on demand. Among other defenses, it was insisted that it was not a note for fifty pounds, as the word "pounds" was not inserted. The conviction was held proper, and the major part of the court inclined to think that the omission of "pounds" in the body of the note, had nothing else appeared, would not have exculpated the prisoner; but it was matter to be left to the jury (as was done in this case), whether it purports to be a note for fifty pounds, or any other sum, but all agreed that the fifty pounds in the margin removed every doubt, and showed that the "fifty" in the body of the note was intended for "pounds." *Phipps v. Tanner*, 5 Car. & P. 488, cited in Byles on Bills (61 Law Lib. 100), is also a strong case. A bill for "twenty-five, seventeen shillings, and three," is a bill for twenty-five pounds, seventeen shillings, three pence. It appears to us, however, that a correct conclusion may be reached from general principles applicable to the case laid down in the authorities. If the figures 3000 in the margin of the writing had the prefix of the dollar-mark customarily used in the United States, then the case put in Story on Promissory Notes, which is supported by numerous decisions, would be decisive. It is laid down as a rule, that bills and notes should express the same for which they are given in the body of the instrument, but it is conceded that

this omission will not be fatal, or render the bill or note invalid, if the true amount can be gathered from other parts of the writing. The case in Story is an example.

The custom is to superscribe bills and notes with the sum in figures for which they are made payable. The object of this is to render the amount certain, and prevent any mistake in the drawing of the instrument. Where there is a defect in the body of the note or bill, the amount mentioned in the margin may be referred to in order to remove any ambiguity in the language used. And where the amount is left in blank in the body of the instrument, it is held that the holder may fill it up with the amount stated in the margin. If there be a discrepancy between the amount stated in the margin and that mentioned in the body of the instrument, the latter prevails, because the former is only a memorandum, while the words used in the body of the contract are a part of the note. In some of the authorities, it is a *prima facie* rule that the body of the note is to govern; but that it may be shown that the amount stated in the margin is correct, according to the intention of the parties; and this being done, will justify, or at least excuse, an alteration to that effect; for that, clearly enough, such an alteration making the note conform to the agreement will not vitiate the instrument, though the general rule undoubtedly is that every material alteration of such a paper destroys its validity. The true rule, however, would seem to be that parol evidence is inadmissible to establish that the sum intended was not that stated in words in the body of the instrument, but was that stated in figures in the margin: Edwards on Bills, 152, 153; Chitty on Bills, 11th Am. from 9th Lond. ed., 149-159; Byles on Bills, 61 Law Lib. 99, 100; Story on Bills, sec. 42. But it has been held that an instrument in the form of a note, given for a blank sum, though superscribed for the correct amount, and transferred in that condition, is not a promissory note, and cannot be declared or recovered on in that shape as a promissory note; though the holder, if it has been made and indorsed and delivered to him in that imperfect condition for value, has a right to fill it up and make it what it was intended to be: Edwards on Bills, 153-158.

But however this may be, that was an attempt, not to remove an ambiguity in the body of the instrument by means of the memorandum in the margin, but to supply a blank. If the sum in the body of the instrument be uncertain or am-

biguous, or being given, the species of money, whether dollars, cents, or pounds, etc., be by oversight left out, the authorities agree that this omission, in furtherance of the intention of the parties, will be supplied by the courts, if there be enough in the margin, or other portions of the writing, to enable them to see what was meant.

And this is especially so against the party making or negotiating it as to whom (if possible) effect is to be given to it: Chitty on Bills, 8th Am. from 8th Lond. ed., 150. In such a case, the instrument in law is a valid note or bill, and may be so declared on, and a recovery had. In a case of our own (*Wood v. Goodrich*, 9 Yerg. 266, a suit upon a bond), the court say: "When in a sealed instrument a word is omitted, without which the sense becomes incomplete, and when, also, the instrument, in its recitals, or otherwise, obviously supplies the meaning of what was omitted, a court of law will construe such instrument, and give effect to it, as if the word omitted had been inserted, and as the sense and obvious meaning of the instrument require."

Now, the very nature and character of the instrument in question, as exhibited on its face (from reading it), demonstrate that it was intended by the parties to be a bill of exchange, which can only be for the payment of money. What other possible construction can be given to the transaction? The issuance and circulation of this paper, in any other view, would be absurd and unmeaning. The words and form employed show what was meant, and among lawyers and commercial men but one answer can be given. The sum is not left blank, either in the body of the instrument or in the margin, nor do they disagree; but the omission consists in the kind or species of money in which the bill was payable, resulting, no doubt, from a mistake in the draughtsman. This omission, we think, may be supplied by the court from what appears in the writing itself. The three thousand in the body of the instrument, and in the margin, could not have been meant for so many cents, such form of expression not being usual, perhaps never employed for any such purpose. They must have been intended either for so many dollars or for so much of the currency of some foreign government. The bill in question, upon its face, shows that it was drawn at Memphis, upon parties at New Orleans, Louisiana, where it was payable, places which the court will take judicial notice are within the United States: 1 Greenl. Ev., secs. 5, 6.

This may be looked to in the interpretation of the contract to ascertain what was meant. Where the currency in which a bill or note is to be paid is not mentioned, the currency of the country in which it is to be paid is presumed by the law: Story on Bills, secs. 42-44. There are certain general rules of interpretation recognized by all nations, which form the basis of all reasoning on the subject of contracts. The object is to ascertain the real intentions of the parties in their stipulations, and when the latter are silent or ambiguous, to ascertain what is the true sense of the words used, and what ought to be implied, in order to give them their true and full effect. The primary rule in all expositions of this sort is that of common sense; words used in contracts may have different meanings attached to them in different places by law or usage; and if they, in themselves, be obscure or ambiguous, custom and usage in a particular place may give them an exact and appropriate meaning. Hence, if the full and entire intention of the parties does not appear from the words of the contract, and if it can be interpreted by any custom or usage of the place where it is made, that course is to be adopted: Story on Promissory Notes, sec. 161. A note made in England for one hundred pounds would mean one hundred pounds sterling; a like note made in America would mean one hundred pounds in American currency, which is one fourth less in value: Story on Promissory Notes, sec. 162. And the word "sterling" has been held to mean sterling in that part of the kingdom where the bill is payable: *Taylor v. Booth*, 1 Car. & P. 286, cited in Byles on Bills, 61 Law Lib. 100.

The like interpretation would be applied to the case of a promissory note drawn in our country and payable in another country where the same denomination or currency existed in both countries, but represented different values. Thus, for example, a note drawn in Boston for one hundred pounds, payable in London, would be construed to be for one hundred pounds sterling; whereas if a note drawn were drawn for the same sum in London and payable in Boston, it would be construed to mean one hundred pounds of the lawful currency of Massachusetts, which, as we have just seen, is one quarter less in value. In each case the ground of interpretation is the presumed intention of the parties, derived from the nature and objects of the instrument: Story on Promissory Notes, sec. 163.

We feel constrained, therefore, to adhere to our opinion, holding this a valid bill of exchange, and that the judgment

of the circuit court must be reversed, and the demurrer overruled.

The remaining question is the judgment to be pronounced by this court. At common law, in the circuit court the judgment for the plaintiff on demurrer to a plea (or replication in abatement) was not final, but only a *respondeat ouster*. In other cases it was interlocutory or final, according to the nature of the action. If the action was for damages in *assumpsit*, etc., it was interlocutory, and the damages were to be assessed on a writ of inquiry; but in debt, etc., for a sum certain, the judgment was final, and the plaintiff might immediately take out execution. And on the execution of writ of inquiry, after judgment on demurrer, it was not competent to the defendant to controvert anything but the amount of the sum in demand: 2 Tidd's Pr., 1st Am. from the London ed., 687, and *De Gailon v. L'Aigle*, 1 Bos. & Pul. 368, cited in note 9. But the judgment might, we apprehend, have been set aside, and the defendant, by way of amendment, allowed to put in a plea upon affidavit of its truth. But now, by the code, section 2936, the party against whom a judgment or demurrer is rendered may plead over as a matter of right, without waiving his privilege of assigning the judgment on demurrer as error in an appellate court, unless he has subsequently had the benefit secured by the demurrer upon the trial of other equivalent issues. It would seem, therefore, that the same judgment ought to be rendered against him as would be upon overruling a plea in abatement; that is, *respondeat ouster*—that he answer or plead. If he fails to plead over, a writ of inquiry, if necessary to ascertain the damages, will issue immediately, and be executed the same term: Code, sec. 2937. If, in the opinion of the court, a demurrer is interposed without cause, terms may be imposed not exceeding the cost of the action: Code, sec. 2938; History of a Lawsuit, 112, 113, 114. And this court, Code, sec. 316, if the judgment or the decree of the inferior court is reversed, is required to give such judgment or make such decree as should have been rendered in the inferior court, and shall issue execution without a *procedendo*, except where the damages to be assessed are uncertain, in which case the case must be remanded for further proceedings. This section governs the case. The damages here are uncertain, and are understood, notwithstanding the cause is in this court, that the party may yet, as a matter of right, plead over to the merits, and that he is not concluded by the demurrer. What judg-

ment we should render if the damages to be assessed were not uncertain, and the amount of the plaintiff's claims could be ascertained by simple calculations from the papers, we need not now decide.

Judgment must be rendered in conformity to this opinion, and the cause remanded for further proceedings.

FIGURES ON MARGIN OF NOTE OR BILL CONSTITUTE NO PART OF IT: *Smith v. Smith*, 53 Am. Dec. 652, and note thereto; but not so, it seems, if the sum is not also expressed in the body of the instrument: See note to *Nugent v. Roland*, 13 Id. 384.

WORDS IN BODY OF INSTRUMENT CONTROL FIGURES IN MARGIN, where a discrepancy exists between the amounts stated: *Payne v. Clark*, 59 Am. Dec. 333, and note 338.

PAROL EVIDENCE THAT BILL WAS DRAWN FOR SUM EXPRESSED IN MARGIN, and not for the sum expressed in body, where they differ, is inadmissible: *Smith v. Smith*, 53 Am. Dec. 652; note to *Payne v. Clark*, 59 Id. 338.

MATERIAL ALTERATION IN NEGOTIABLE INSTRUMENT RENDERS IT VOID. For illustrations, see *Holland v. Hatch*, 71 Am. Dec. 363, and note thereto 369; *Sturges v. Williams*, 75 Id. 473, and note 476; *White v. Hase*, 70 Id. 548.

FILLING BLANKS IN NOTE, EFFECT OF: See *Fisher v. Dennis*, 65 Am. Dec. 534; *Holland v. Hatch*, 71 Id. 363, and cases collected in notes thereto.

CONTRACT MUST BE CONSTRUED ACCORDING TO INTENTION OF PARTIES: *Singleton v. Carroll*, 22 Am. Dec. 95; *Howell v. Howell*, 47 Id. 335; *Menard v. Scudder*, 56 Id. 610, and note 618; as gathered from its terms: *Tindall v. Conover*, 40 Id. 220; *Workman v. Insurance Co.*, 22 Id. 141; *Chapman v. Glassell*, 48 Id. 41; *Abbott v. Gatch*, 71 Id. 635. Even where language is ambiguous, effect should be given to intention: *Benjamin v. McConnell*, 46 Id. 474; and obscure parts may be explained by the parts which are clear: *Watson v. Blaine*, 14 Id. 669. The ordinary and legal meaning of the words used must be taken into consideration: *Workman v. Insurance Co.*, 22 Id. 141; and evidence of usage or custom is admissible for the purpose of ascertaining the sense and understanding of the parties: *Cox v. O'Riley*, 58 Id. 633, and collected cases in note to same, 638.

JUDGMENT UPON DEMURRER SHOULD BE RESPONDEAT OUSTER: *Cook v. Crawford*, 46 Am. Dec. 93; but a judgment sustaining or overruling a demurrer is not final: See collected cases in note to *Williams v. Field*, 60 Id. 431.

THE PRINCIPAL CASE WAS CITED in *Cowan v. Lowry*, 7 Lea, 624, to the point that an omitted word, essential to the validity of an instrument, may be supplied by intendment, when the recitals of the instrument or its sense and obvious meaning suggest the proper construction. It was also cited in *Warder v. Millard*, 8 Id. 584, to the point that the figures written or indorsed on any written instrument may be looked to in supplying a blank.

ROBINSON v. STATE.

[1 COLDWELL, 120.]

TO CONSTITUTE LARCENY, there must be a trespass in the taking, and the thief must take the property *animo furandi*.

BAILEE'S CONVERSION OF PROPERTY IS NOT LARCENY, provided he takes the particular thing bailed. But if a carrier opens a bale or package of goods, or pierces a vessel of wine and takes away a part thereof, it will constitute a larceny, for here the *animus furandi* is manifest.

FACTS CONSTITUTING LARCENY AND SHOWING DISTINCTION BETWEEN TRESPASS AND LARCENY.—A left his trunk, unlocked, and in which there was money, with B, telling him to keep the room secured. In A's absence, B took a double-eagle and applied it to his own use. This was held to be larceny. If the money itself had been handed to B to keep safely, and he had applied it to his own use, it would have been only a trespass, but here the trunk, and not the money, was left with him.

INDICTMENT for larceny. The facts are stated in the opinion.

J. W. Dougherty and J. R. Hawkins, for Robinson.

John W. Head, attorney-general, for the state.

By Court, CARUTHERS, J. The indictment is for larceny in feloniously taking a twenty-dollar gold piece of one Eacles. The charge is well sustained by the proof; and the verdict of guilty and the judgment thereon must be affirmed, if the law was correctly charged by the court.

The controverted point arises upon this state of facts: "The prosecutor left his room and trunk unlocked, but closed, in charge of defendant. He told him there was money in the trunk, and to keep the room secured." In his absence, one double-eagle was taken by the defendant and applied to his own use, and perhaps other moneys, but that is all that is fixed upon him by the evidence. The court charged that the taking of the money under these circumstances constituted the crime of larceny. For the defendant, it is insisted that it was only a trespass, as the money was in his hands as bailee. We think the law is as charged by his honor.

It is true that there must be a trespass in the taking, and that is not the case when the bailee converts property. But that must be where the particular thing taken was bailed. In 4 Bla. Com., c. 17, p. 230, text note, the law on this point is laid down, and has perhaps, never been departed from. He says there must be a taking, which implies the consent of the owner to be wanting. Therefore no delivery of the owner to the offender upon trust can ground a larceny. As, if A lends B a

horse and he rides away with him, or if I send goods by a carrier and he carries them away, there are no larcenies. But if the carrier opens a bale or package of goods, or pierces a vessel of wine and takes away a part thereof, these are larcenies, "for here the *animus furandi* is manifest." It will then be very clear that if a trunk be left in the custody of any one to keep safely, or even carry, and he opens it and appropriates part or the whole of its contents to his own use, it is larceny. If the money itself had been handed to him to keep safely, or to carry, and he had applied it to his own use, it would be otherwise—only a trespass. The money in this case was never placed in his keeping, but only the trunk.

This case cannot be distinguished from those put in the books, and cited above, but must be covered by the same principle. The case, then, is free from error, and the judgment will be affirmed, and the sentence enforced.

TO CONSTITUTE LARCENY, INTENT TO STEAL MUST EXIST: *People v. Call*, 43 Am. Dec. 655, and note 659; note to *State v. Homes*, 57 Id. 273, where this point is elaborately treated, and many cases cited; *Dignowitty v. State*, 67 Id. 670, and note 675; *State v. South*, 75 Id. 250, and note 253.

LARCENY BY BAILEES: See note to *People v. Call*, 43 Am. Dec. 658; note to *State v. Homes*, 57 Id. 282. Larceny may be committed of goods obtained from the owner by delivery, if it be done *animo furandi*: *State v. Gorman*, 10 Id. 576. It is larceny in servant or bailee to open a package intrusted to his care, and take away any part of the goods therein, and dispose of them to his own use *animo furandi*: *State v. Fairclough*, 76 Id. 590, and note 592.

TO CONSTITUTE LARCENY, THERE MUST BE TRESPASS in the taking: See exhaustive note on larceny following *State v. Homes*, 57 Am. Dec. 271-286.

HALE v. STATE.

[1 COLDWELL, 187.]

FORGERY IN SIGNING NAME TO ORDER FOR GOODS.—Where code declares that "forgery is the fraudulent making or alteration of any writing to the prejudice of another's right," it is forgery to sign another's name to an order for goods, without authority, and for the fraudulent purpose of obtaining the goods on the credit of the party whose name is forged: See Code of Tenn. 1858, sec. 4718.

ACCEPTANCE OF FORGED ORDER FOR GOODS IS UNNECESSARY TO MAKE OUT OFFENSE OF FORGERY. It is enough that the fraudulent intent existed, and that injury might have resulted from an accomplishment of the forger's object.

WALTON v. STATE, 14 TENN. 377, OVERRULED.

MOTION in arrest of judgment. Plaintiff in error had been convicted of forgery, and his motion was overruled. This re-

fusal was assigned as error. The other facts are stated in the opinion.

L. C. and M. T. Haynes, for Hale.

John W. Head, attorney-general, for the state.

By Court, CARUTHERS, J. The conviction was for forging this written order: "Mr. J. R. Anderson, let Miller have three dollars in goods, and charge J. G. King, July 27, 1859." The error assigned is that the court refused to arrest the judgment, on the ground that the making of the instrument exhibited did not constitute the crime of forgery in the law.

"Forgery is the fraudulently making or alteration of any writing to the prejudice of another's right:" Code, sec. 4718.

This would seem to cover the case clearly enough. An order in name of King to Anderson for three dollars' worth of goods is made without authority, and for the fraudulent purpose of obtaining the goods of Anderson on the credit of King. His name is forged to bind him unlawfully, and for the benefit of the forger. So the rights of King or Anderson must be prejudiced, if the object intended be accomplished, that is, the goods obtained upon the paper. Surely the plain common sense of the thing, and the fair meaning of the language employed, and the object in view, can leave no doubt in the case.

But it is said that the decision in the case of *Walton v. State*, 6 Yerg. 377, fixes the meaning of this law, and that the case before us falls within it. We are not disposed to yield to the authority of that case, if it must be understood to be similar to this. There is an intimation against it in *Snell v. State*, 2 Humph. 350. It was made at a time when technical objections, operating as a shield for crime, were more indulged in than they are at the present day. The inclination now, both of the legislature and the courts, is not to screen the guilty by artificial and unmeaning rules and distinctions, but to see that the law is enforced against the guilty.

This case includes every ingredient in the definition of forgery. It is said to be only a request; so are all orders, bills, drafts, and checks. It was not accepted by Anderson, and therefore neither he nor King, whose name was forged, was injured. That is not necessary to make out the offense. It is sufficient that the fraudulent intent existed, and that the injury might have resulted if his object had been accomplished: 2 Russell on Crimes, 362; *Commonwealth v. Ladd*, 15 Mass. 526; *State v. Humphreys*, 10 Hump. 444. We think the indictment

contains a perfect charge of forgery in all its legal elements, and that the court did not err in refusing to arrest the judgment.

The judgment is therefore affirmed, and sentence of three years' confinement in the penitentiary will be enforced.

In another case, against the same individual, the judgment was arrested, and the state appealed. There is no difference in principle between the cases, but they were passed upon by different circuit judges, who differed as to the authority of the case of *Walton v. State*, 6 Yerg. 377. The indictment in this last case was predicated upon an order in these words:

"Mr. Pile & Taylor let Hinry Hale have to shirt and oblige yours May 27, 1860. McJ. GALLAHAR."

There can be no doubt, if we are right in the other case, that this must be reversed, and judgment pronounced here on the verdict of the jury, and this will be done, and the sentence of three years' imprisonment enforced.

TO CONSTITUTE FORGERY, INSTRUMENT MUST BE SUCH, WHEN FORGED, as to tend to prejudice the rights of another: *Barnum v. State*, 45 Am. Dec. 601; and its distinguishing characteristic is the crafty fraud and deceit whereby it is designed to injure some one: *State v. Floyd*, 53 Id. 689, and note 694.

IF FORGERY WAS DONE WITH INTENTION TO DEFRAUD, IT IS SUFFICIENT to make it a felony. It is of no consequence whether any one was actually defrauded or not. If any one might have been injured by the forged instrument, the offense is complete: *State v. Washington*, 1 Am. Dec. 601; *People v. Fitch*, 19 Id. 477; *Arnold v. Cost*, 22 Id. 302, and extended note thereto on forgery, 306-321.

THE PRINCIPAL CASE WAS CITED in *State v. Ward*, 7 Baxt. 78, to the point that it is not necessary that injury has actually resulted in order to make out the offense of forgery. It is sufficient that the fraudulent intent existed, and that injury might have resulted if the forger's object had been accomplished.

HALE v. HALE.

[1 COLDWELL, 278.]

COMPOUND INTEREST IS NOT USURY.

COMPUTATION OF INTEREST UPON INTEREST, TURNED INTO PRINCIPAL, does not increase the rate of interest upon the amount of the original loan, and does not constitute usury.

COMPOUND INTEREST MAY BE AGREED UPON. Parties to a loan may lawfully agree, when it is made, that if the interest is not paid at the time stipulated, it shall be treated as principal and bear interest.

WHEN PAYMENT OF INTEREST AT STATED PERIODS FORMS PART OF CONTRACT, and the payment of the principal sum is postponed to a distant day, upon faith that the interest will be punctually and regularly paid at the times agreed upon, interest may be recovered upon interest from the time it falls due.

AFTER INTEREST BECOMES DUE, it may, by agreement, be turned into principal and bear interest.

BILL to enjoin a judgment at law, on the ground that there was usury in the note upon which the judgment was founded. The bill was dismissed, and complainant appealed. The facts are stated in the opinion.

Maxwell and Milligan, for the complainant.

Arnold, for the respondent.

By Court, MCKINNEY, J. The complainant seeks to be relieved, in part, against a judgment for four hundred and ninety-five dollars and fifty-seven cents, obtained against him by the defendant, on the ground that the note on which the judgment was founded was, to some extent, usurious.

The parties are brothers, and there seems to have been a course of dealings between them, running through several years. On the fourteenth of May, 1845, they made a final settlement, the result of which was, that complainant fell in debt to defendant in the sum of eight hundred and thirteen dollars and fifty-one cents, for which the former executed to the latter a bill single, due one day from date, and which, on its face, purports to be an adjustment of their accounts up to that date.

Upon this bill single, suit was commenced on the thirty-first of January, 1852, and judgment was obtained for the sum above stated, in September, 1857.

In the progress of said suit at law, the defendant (now complainant) filed a petition for the discovery of the alleged usury, which was answered; but on the trial, the circuit judge ruled that the matter of usury could not be inquired into, as there was no plea of usury in the case. And in June, 1858, this bill was filed, reiterating pretty much the same charges contained in the petition.

It is alleged in the bill, and more explicitly in the petition for discovery, which is part of the evidence, that the bill single for eight hundred and thirteen dollars and fifty-one cents was made up of the amounts of several small notes held by the defendant on complainant previous to the date of the settle-

ment before mentioned; and it is alleged that compound interest was computed on said several notes, from year to year, and added to the principal each year, thus making the interest bear interest; and that by this process of compounding, the proper amount was swelled some three hundred dollars. No objection, it seems, was made at the settlement to the computation of compound interest on the several small notes; and from the statement in the bill, and the more explicit statement in the petition for discovery, it is manifest that it was agreed between the parties that compound interest should be reckoned upon said notes.

The ground of complaint seems to be that compound interest was not also allowed to complainant on the settlement on the various items of his account against the defendant as it was understood between the parties was to have been done, as is alleged by complainant. This, however, is denied by defendant, and is not sufficiently proved.

We need not stop to notice the improbability and apparent inconsistency of the statement of the supposed ground of equity assumed in the bill, because, putting the case in the strongest possible aspect for the complainant, it is obvious that he is entitled to no relief against the judgment at law.

There can be no plainer legal proposition stated than that compound interest is not usury. In the language of the court in *Kellogg v. Hickok*, 1 Wend. 521, "compound interest has nothing to do with the question of usury."

It is plain that the computation of interest upon interest, turned into principal, does not increase the rate of interest upon the amount of the original loan. Indeed, the cases which hold that interest upon interest is not allowable, concede generally that this does not constitute usury. It is disallowed upon a principle of supposed public policy, being regarded as a hard, oppressive exaction in favor of negligent creditors, and tending to usury: See *Mowry v. Bishop*, 5 Paige, 102; *State v. Jackson*, 1 Johns. Ch. 14; *La Grange v. Hamilton*, 4 T. R. 613. There is a considerable diversity of judicial opinion to be found in the books upon this question.

According to some of the authorities, an agreement at the time of the loan, that if the interest be not paid at the time stipulated it shall be deemed principal and bear interest, will not be enforced in equity. But it is otherwise, it seems, where an agreement to that effect has been made subsequent to the original contract, or when the interest fell due: *State v. Jackson*,

1 Johns. Ch. 14-16, and cases referred to. The reason of this distinction is certainly not very obvious. The more reasonable doctrine, as it seems to us, is that asserted in *Kennon v. Dickins*, Cam. & N. 357 (cited in *Mowry v. Bishop*, 5 Paige, 102), namely, that when the payment of interest at stated periods forms part of the contract and the payment of the principal sum is postponed to a distant day, upon the faith of the agreement for a regular and punctual discharge of the interest at the times agreed upon, equity and good conscience, at least, require that the debtor should fulfill his engagement, or render to his creditor the usual equivalent for the non-payment of the interest at the times agreed upon.

There are numerous other American cases, which have sanctioned the recovery of interest upon interest from the time it became due, referred to: *Mowry v. Bishop*, 5 Paige, 102. We are aware of no rule of law which would be violated by permitting the parties to agree at the time of the loan that if the interest be not paid at the time stipulated it should be treated as principal, and bear interest. This is surely nothing more than justice to the lender.

The doctrine, that interest upon interest cannot be stipulated for at the time of the loan or contract, has been carried no further, in the cases to which we have had access, than a refusal to carry into effect such an agreement. But if, after the interest is due, an agreement is made that it shall carry interest, such an agreement would be enforced, as we understand the doctrine. At all events, it is clear that a court of equity would not set aside or relieve against such an agreement, much less would it interpose after judgment at law, founded upon the agreement; nor if the compound interest were voluntarily paid could it be recovered back: *Mowry v. Bishop*, 5 Paige, 98, 102, and cases there cited; *Kellogg v. Hickok*, 1 Wend. 521.

This latter course of decision—if we were inclined to follow it—would deny the complainant any relief in this case. But, as before stated, it seems to us that the case of *Kennon v. Dickins*, Cam. & N. 357, lays down the correct doctrine; and it appears that in several of the states the law has been settled accordingly. There is, however, a conflict of decision upon this subject: See Chitty on Con., ed. of 1848, 648, note 1, where the cases are referred to: *Mowry v. Bishop*, 5 Paige, 98.

It results, that in neither aspect of the case can relief be given to complainants.

If it be assumed that it was stipulated in the original con-

tract that the interest should be compounded if not punctually paid, we hold that there is nothing illegal, or immoral, or contrary to policy in such an agreement. The interest is both legally and equitably due at the expiration of the period limited for its payment; and if, instead of paying the interest, it be converted into principal by the previous agreement of the parties, we think there can be no objection to enforcing such an agreement.

But if the agreement to compound the interest were made after the interest became due, and at the time of the settlement, the weight of authority is still greater against the claim to relief, as we have before seen.

The decree will be reversed, and the bill dismissed.

COMPOUNDING INTEREST IS NOT OF ITSELF USURIOUS, though the enforcement of its payment has often been refused by the courts on the ground of public policy: See note to *Davis v. Garr*, 55 Am. Dec. 397, showing at length what law governs usurious contracts. So in *Myers v. Myers*, 16 Id. 648, it is held that compound interest may be allowed in some cases.

INTEREST ON INTEREST, IN ABSENCE OF SPECIAL AGREEMENT, IS NOT ALLOWED: See extended note to *Hart v. Dorman*, 50 Am. Dec. 290, giving rules at length for computing interest; note to *Selleck v. French*, 6 Id. 197-199, showing in what cases compound interest may be allowed. But in *Breckinridge v. Brooks*, 12 Id. 401, it is held that compound interest, though not forbidden by the statute against usury, is iniquitous, and equity will not enforce its payment, even where there is an agreement to pay it. So a contract to pay interest on interest not yet due has been held inequitable, and will not be enforced: *Mason v. Callender*, 72 Id. 102.

IF INTEREST IS DUE, IT MAY BE ADDED TO PRINCIPAL, and a contract to pay interest on such new principal will be upheld: *Mason v. Callender*, 72 Am. Dec. 102; *Van Benschooten v. Lawson*, 10 Id. 333. So the interest on a promissory note which is not paid when it becomes due, must be added to the principal, and thereafter the aggregate will bear interest: *Doig v. Barkley*, 45 Id. 762; *Talliaferro's Ex'rs v. King's Adm'r*, 35 Id. 140. So interest upon unpaid installments of interest on bonds may be collected after such installments of interest become due: *Gibbs v. Chiselm*, 10 Id. 560.

THE PRINCIPAL CASE WAS CITED in *Parham v. Pulliam*, 5 Coldw. 505, to the point that parties may lawfully agree to convert interest already due into principal, and stipulate that principal so obtained may be made to draw interest.

MULHOLLAND v. ELLITSON.

[1 GOLDWELL, 307.]

EVIDENCE AS TO DECLARATION OF VENDOR AFTER SALE IS COMPETENT TO SHOW FACT OF SALE. Where A sold personal property to B, which was subsequently levied on by A's creditors as A's property, and B sues for its recovery, it is competent for B to prove, by a third person, that some years after the sale, when A and B were together, such person heard them declare the fact of sale and its terms.

DECLARATIONS AGAINST INTEREST AND THOSE COMING FROM PRIVY IN ESTATE ARE ADMISSIBLE. Where A sold personal property to B, which A's creditors subsequently levied on as A's property, and B sued for its recovery, A's admission that he had sold the property will, in a contest between A and B in regard to its title, be competent against A, upon the principle of a declaration against his interest. So in a similar contest between B and a third party claiming under him, B's declaration of the fact of sale or its terms, made before the existence of the debts of A's creditors, and before B's sale to such party, is admissible because the purchaser is in privity with his vendor, and took the property incumbered with B's declarations. They are admissible, not only as coming from a privity in estate, and therefore from the party himself, but also as a method of establishing title.

ADMISSIONS AS TO FACT OF SALE, BY PARTY THERETO, ARE ORIGINAL, NOT HEARSAY, EVIDENCE, and may be proved by any competent witness who heard them, without calling the party by whom they were made. They are to be taken as parts of the *res gestæ*, and it is immaterial whether such party be dead or alive, or that he may be examined as a witness. His declarations are still admissible as a mode of making out title.

EFFECT OF DECLARATION AS TO FACT OF SALE, WHEN MADE BEFORE AND AFTER LIEN OF CREDITORS HAS ATTACHED. Where A sold property to B, and A's creditors attached it as A's property, admissions made by A and B as to the fact of sale, and before the judgment and levy on the property, are competent proof, though the debts of the creditors originated anterior to the declarations, or even before the purchase by B. But if the lien of the creditors attached prior to such admission, then the creditors cannot be affected by the declaration of sale. And one who levies on the property is subject to the same rules of evidence.

TRESPASS against a sheriff. The facts are stated in the opinion.

Samuel Milligan, for the plaintiff in error.

Barton and Shields, for the defendants in error.

By Court, WRIGHT, J. This was an action of trespass, for an alleged illegal seizure and sale of a piano-forte, which, it is conceded, at one time belonged to Michael Mulholland, but which the plaintiff, who is his brother, claims to have purchased of him in the state of Virginia, where at the time they both resided.

There is evidence tending to show that the said Michael had

become indebted to the plaintiff in the sum of about three hundred and forty dollars, for work done for him by the plaintiff in the completion of a contract upon a railroad, the said Michael being the contractor; and that in payment of this debt he let the plaintiff have the piano. Subsequent to this sale, the said Michael removed to the state of Tennessee; and there is proof that when he was about leaving the state of Virginia, the plaintiff loaned the piano to his wife, who seems to have been a teacher of music, telling her that it would help support her; and that she and her husband brought it with them to Jefferson county, in this state, where certain of his creditors, whose debts, as is to be inferred from this record, were contracted after his removal from Virginia, caused executions to be issued to the sheriff, under which he made sale of the piano; and this is the trespass complained of. Verdict and judgment were rendered for the defendants, and the plaintiff appeals. Upon the trial, it would seem the right of the plaintiff to recover was denied, both upon the ground that no sale of the piano had been made to him, and if made, that the sale was fraudulent, and intended to hinder the creditors of said Michael, he being at the time very much indebted.

The plaintiff took the deposition of one Hancock, in which there was proof to the effect that he was not present, and did not witness the sale of the piano by Michael to the plaintiff; but that in June, 1854, the said Michael, being largely indebted to him, and he being security for him to others, he agreed to give him a deed of trust on his property, for the benefit of himself and some of his other creditors; that witness proceeded to take a list of the articles to be embraced in the proposed deed of trust, and in doing so, the piano was mentioned by him, whereupon Michael Mulholland immediately said the piano should not be included in the deed of trust, as he had already disposed of it, or sold it, to Peter Mulholland, the plaintiff, for a debt he owed him. The said Peter was present at the time, and a further conversation then took place between the said Peter and the said Michael, in relation to the piano and the sale of it, the substance of which was that there was a sale of the piano from Michael to Peter, for a valuable consideration, and that a certain brown mare was purchased by Peter, of Michael, for the same purpose. This proof, upon objection by the defendants, was excluded from the jury by the circuit judge.

It seems to us that this is erroneous. Manifestly, in a con-

test between the plaintiff and the said Michael, in regard to the title of this property, these admissions would be competent against him, upon the principle of a declaration against his interest; and also in a contest between the plaintiff and a third party, claiming this property under a purchase made by him of said Michael, at a period subsequent to the admissions, they would be admissible, because the purchaser is in privity with his vendor, and takes the property incumbered with his declarations. They are offered as coming from a privy in estate, and therefore, in law, from the party himself.

Thus it has been held, upon an issue between two persons, whether a third person died possessed of certain personal property, that evidence might be given of a declaration, made by that third person, that he had assigned the property, the party against whom the declarations were adduced claiming under that person: *Ivat v. Finch*, 1 Taunt. 141. This principle is expressly settled in *Guy v. Hall*, 3 Murph. 150, and *May v. Gentry*, 4 Dev. & B. L. 117. The declarations are not only evidence against the man who made them, but against one claiming under him by a contemporaneous or subsequent contract.

These admissions by third persons, as they derive their value and legal force from the relation of the party making them to the property in question, may be proved by any competent witness who heard them, without calling the party by whom they were made. The question is, whether he made the admission, and not merely whether the fact is as he admitted it to be. Its truth, where the admission is not conclusive (and it is seldom so), may be controverted by other testimony, even by calling the party himself, when competent; but it is not necessary to produce him: his declarations, when admissible at all, being admissible as original evidence, and not as hearsay, are to be taken as parts of the *res gestæ*: 1 Greenl. Ev., secs. 189, 190; *Guy v. Hall*, 3 Murph. 150. And it is immaterial whether he be dead or alive, or that he may be examined as a witness in the case, his declarations being still admissible. In truth, in a case like this, it is but a mode of making out title. Now, upon what principle is it that the creditors of Michael Mulholland, who have become such since these declarations were made, shall escape being operated with them as evidence? Do they not claim under him, and seek to sell this property as his? It is true, they may not, in all respects, be in privity with him, since they may assail the

transaction between him and the plaintiff for fraud, and thus undo what he could not; and so may a subsequent purchaser, who was intended to be defrauded by the previous sale; and yet, we have seen, the admissions are evidence against him.

If the witness had heard the sale made between the plaintiff and his brother, then, beyond all debate, what they said and did at the time would be admissible; and if they afterwards, when together, or the said Michael, when alone, before the existence of the debts of these creditors, declared the fact of the sale, or its terms, these declarations, in our opinion, become original evidence of the plaintiff's title, and were admissible for whatever they were worth in a contest with the creditors, not only upon the principle of privity before stated, but as a method of establishing title.

We are not to be understood as holding that if the debts of these creditors originated anterior to the declarations, or even to the plaintiff's purchase, they would not, upon the principle stated, be equally admissible. On the contrary, we think they would—the levy upon the property being subsequent to the declarations. But if the lien of the creditors attached prior to the declarations, then they could not be affected by them. Of course, the sheriff or other officer in seizing this property would be subject to the same rules of evidence.

But, it is said, if this be so, there should not be a new trial; because the said Michael himself was examined by the plaintiff, and established the sale upon oath, and that, therefore, the evidence of Hancock was unnecessary, it being impossible that the mere declarations or admissions of the witness could be of greater weight in the case than his oath. But they were not, as detailed by Hancock, the mere declarations or admissions of Michael, but something more—a circumstantial narration of the contract of sale was made between Peter and Michael. But if they were the mere admissions of Michael, we cannot stop to inquire how much additional weight the evidence thus improperly withheld from the jury might have had with them had it been received. We can readily see that the rejected evidence might, upon the state of facts in this record, have had an impartial influence in the case: *Turnley v. Evans*, 3 Humph. 222–224.

The judgment will be reversed, and a new trial awarded.

DECLARATIONS AND ADMISSIONS OF PARTY AGAINST HIS INTEREST, ADMISSIBILITY OF, AS EVIDENCE: *Dennis v. Chapman*, 54 Am. Dec. 186, and note 188; *Fickitt v. Swift*, 66 Id. 214; *Fralick v. Presley*, 65 Id. 413; *Maxwell v. Harrison*, 52 Id. 385, and note 389; note to *Horton v. Smith*, 42 Id. 631–633.

DECLARATIONS OF VENDOR OF PERSONALTY AFTER SALE, ADMISSIBILITY OF, AGAINST PARTY CLAIMING UNDER HIM: See note to *Paige v. Cagwin*, 42 Am. Dec. 80, 81; note to *Settle v. Alton*, 52 Id. 399; note to *Horton v. Smith*, 42 Id. 631-633.

DECLARATIONS OR ADMISSIONS AS TO SALE.—Title to property cannot be proved by evidence of declarations of a former owner that he sold it to the present claimant: *Worrall v. Parmelee*, 49 Am. Dec. 350. But in *Thompson v. Thompson*, 68 Id. 638, a vendor's declarations after conveyance of realty are held admissible to defeat it.

ADMISSIONS AS EVIDENCE, GENERALLY, are discussed in *Printup v. Mitchell*, 63 Am. Dec. 258. As to declarations, see note to *Horton v. Smith*, 42 Id. 631-633.

MERE NARRATION OF EVENT AFTER IT IS FULLY ENDED does not form part of the *res gestæ*: *Innis v. Steamer Senator*, 54 Am. Dec. 305.

THE PRINCIPAL CASE WAS CITED IN *Peoples v. Denault*, 11 Heisk. 433, to the point that it is error to reject evidence of declarations and acts of one formerly in possession of property, made before he sold to the person from whom defendant purchased, and under whose title defendant claims the property. In a replevin suit it is competent for the plaintiff, in order to maintain his title, to show in evidence the declarations of the intermediate vendee, while in possession, expressing the character and extent of the title claimed by him. Thus where A sold a horse to B, and B to C, A, in an action against C, may prove B's declarations, while in possession of the horse, showing the title of B; but otherwise if the declarations were made after B parted with the possession: *Holmark v. Mohn*, 5 Coldw. 484.

EATHERLY v. EATHERLY.

[1 COLDWELL, 461.]

PAROL EVIDENCE CANNOT, AS GENERAL RULE, BE ADMITTED TO CONTRADICT, ADD TO, OR EXPLAIN CONTENTS OF WRITTEN WILL; even though the consequences may be the total or partial failure of the testator's intended disposition.

PAROL EVIDENCE IS ADMISSIBLE TO EXPLAIN OR REMOVE LATENT AMBIGUITY IN WRITTEN WILL; but such ambiguity must appear upon the face of the paper. If no ambiguity appears, such evidence will not be admitted.

PAROL EVIDENCE IS SOMETIMES ADMISSIBLE TO EXPLAIN AMBIGUITY UPON FACTUM OF WILL, where such ambiguity is shown upon the face of the instrument.

AMBIGUITY UPON FACTUM MEANS, NOT AMBIGUITY UPON CONSTRUCTION, as whether a particular clause shall have a particular effect, but an ambiguity as to the foundation itself of the instrument, or a particular part of it, as whether the testator meant a particular clause to be part of the instrument, or whether it was introduced with his knowledge; whether a codicil was meant to republish a former or subsequent will; or whether the residuary clause, or any other passage, was accidentally omitted.

WHERE THERE IS SOME ABSURDITY OR AMBIGUITY ON FACE OF WILL, ascribable to something either omitted or inserted, and there is clear and satisfactory proof that the insertion or omission was not intended by the

testator, the ecclesiastical court is bound to pronounce for the will; not in its actual state, but with its errors removed or corrected.

COURTS OF EQUITY HAVE POWER TO CORRECT MISTAKES IN WILLS, where they clearly appear on its face, or are made to clearly appear from a legal construction of its terms.

TESTATOR'S INTENTION WILL PREVAIL OVER WORDS IN HIS WILL, and it is the duty of all courts to give effect to such intention.

MISTAKES IN WILL ARE NEVER TO BE INTENDED, if a reasonable construction can be found out; and reference to other parts of the will may be had in order to supply an omission or explain a mistake.

EXAMPLE OF OMISSION IN WILL WHICH EQUITY WILL SUPPLY.—Where a will shows upon its face what property the testator owned; that he intended to dispose of it all, and supposed that he had done so; that he had disposed of it all except one half of his land; and that there was left in the will an incomplete clause, omitting to state the subject of any gift, but which was plainly intended to be the other moiety of the land—a court of equity will supply the omission. The omission is apparent upon the face of the paper, and extrinsic evidence is unnecessary to supply it.

APPLICATION to supply an omission in the will of complainants' ancestor. The chancellor decreed a refusal to reform the clause. Complainants appealed. The other facts are stated in the opinion.

Ed. Gollady, for the complainants.

Williamsons, for the respondents.

By Court, **McKINNEY, J.** This cause is brought here by appeal from so much of the decree of the chancellor as refused to reform a clause of the will of complainants' testator, by supplying an omission therein, occasioned by the inadvertence of the person who wrote the will.

The facts are these: The testator, John Eatherly, at the date of the will, was the owner of a tract of land, on which he then lived, in Wilson county; also of certain slaves, and a small amount of choses in action, and other personalty. The will bears date the thirtieth of January, 1856, and it was proved and admitted to record in proper form in the county court of Wilson. At its date, the testator had two sons, Turner B. and John C. Eatherly, and a married daughter, Dolly C. Young, wife of defendant P. B. Young.

The will first "bequeaths to" Turner B. "one half" of tract of land on which testator resided; also "one third" of the negroes of which he might be possessed at his death. The will then proceeds as follows: "I also give and bequeath to Turner B. Eatherly, in trust for the sole and separate use of my daughter, Dolly Caroline Young, wife of P. B. Young, dur-

ing her life-time, and after her death to her children, or the survivors of them." Here the clause abruptly ends, without stating the subject or thing intended to be given.

Immediately following the foregoing unfinished clause comes this bequest, namely: "I further give and bequeath to the said Turner B., in trust, for the said Dolly Caroline, one third of the negro property of which I am possessed at my death, during her life-time, and after her death, for her children, or the survivors of them."

Next follows a bequest to John C. Eatherly of the other "one third" of the negro property, some specified articles of personal property, and a note for one hundred and fifty-five dollars in money; and lastly, follows a residuary clause, by which the testator gives all the residue of his personal property, of every kind and nature whatsoever, to his son, Turner B., whom he appoints sole executor of the will.

The parol evidence of the draughtsman of the will, and other witnesses, establishes, very clearly, the intention of the testator to give one half of the land to his daughter, Mrs. Young; and his express instructions to the writer of the will to that effect; and that the omission in the will was the mere result of mistake and inadvertance on the part of the person who wrote the will, the testator himself being blind. This evidence, however, is scarcely necessary to be noticed in this particular case. The omission, if it can be supplied at all, may be done from the evidence furnished by the paper itself, without the aid of proof *dehors* the will.

The question is one of importance, and involves the exercise of an extremely delicate and dangerous jurisdiction, the temptation to the abuse of which has led the courts to hedge it in by the most stringent rules, and to adopt a double degree of caution in its exercise. The language of the elementary books, as well as of the reported cases on this subject, is too often rather general and inexplicit. The doctrine is stated in some of the books, in general terms, that parol evidence is not admissible to supply any clause or word which may have been inadvertently omitted by the person drawing or copying the will: 1 Jarman on Wills, 2d Am. ed., 346; *Earl of Newburg's Case*, 5 Madd. 364. And this principle is quoted with approbation by this court, in *Weatherhead v. Sewell*, 9 Humph. 272-300; and in the absence of ambiguity on the face of the will, its correctness, as a general rule, is conceded.

The law requires that all wills, with the isolated exception

of nuncupative wills, shall be in writing, and executed with certain solemnities; and to these the rule applies, with peculiar force, that parol evidence cannot be admitted to contradict, add to, or explain their contents, even though the consequences may be the total or partial failure of the testator's intended disposition: 1 Jarman on Wills, 848.

But no doubt can be entertained, in the present state of the law, in regard to the admissibility of parol evidence to explain or remove what may be regarded as a latent ambiguity in a will. This much is generally conceded, though in some of the cases the evidence has been received to remove what might, perhaps, seem to be rather of the nature of a patent than a latent ambiguity. And it may here be observed, that in cases of the sort under consideration, if a remedy exist at all, it must, under our judicial organization, be administered alone in a court of equity, whether the will be of personal or real property, as we have no ecclesiastical court, or court of probate, invested with any such jurisdiction: See *Buchanan v. Mallock*, 8 Humph. 390, 398 [47 Am. Dec. 622]. In 1 Williams on Executors, 201, it is said that if there is an ambiguity upon the *factum* of the instrument, parol evidence may be admitted, under some circumstances, to explain it.

By ambiguity upon the *factum* is meant, not an ambiguity upon the construction, as whether a particular clause shall have a particular effect, but an ambiguity as to the foundation itself of the instrument, or a particular part of it, as whether the testator meant a particular clause to be part of the instrument, or whether it was introduced with his knowledge; whether a codicil was meant to republish a former or subsequent will; or whether the residuary clause, or any other passage, was accidentally omitted. These are all matters of ambiguity upon the *factum* of the instrument.

But to justify the admission of parol evidence in such cases, the ambiguity must be upon the face of the paper; for where no ambiguity appears upon the face of the instrument, the court will not admit parol evidence: See cases cited in 1 Williams on Executors, 222, and notes; and particularly the case of *Fawcett v. Jones*, 3 Phillim. 434, where it was sought to show that the residuary clause of the will was not co-extensive with the instructions given, through mere error and oversight of the drawer and the testator himself. But Sir John Nichol, upon an elaborate review of all the previous cases on the subject, refused the application, on the ground that the will had been

regularly executed, and there was no ambiguity apparent upon the face of it.

But in the case of *Damar v. Janssen*, commented on in *Fawcett v. Jones*, 3 Phillim. 485, the testator made instructions for a will, in which he left the residuum to his youngest daughter, but the attorney, in writing the will, omitted the residuary clause; and the court admitted evidence as to the omission, and of the testator's expressing himself as having left the residuum to his youngest daughter, and pronounced for the instructions as part of the will. In noticing this case, Sir John Nichol observes that there was an ambiguity on the face of the will, inasmuch as there was a total omission of any disposal of the residue, and a total omission of a provision for one of the testator's daughters.

The result of the ecclesiastical cases upon the subject is stated by Mr. Williams to be that where there is "some absurdity or ambiguity on the face of the will ascribable to something either omitted or inserted," and there is clear and satisfactory proof that the insertion or omission was contrary to the instruction of the testator, the court is bound to pronounce for the will, not in its actual state, but with such error first reformed or corrected, either by insertion of the passage omitted or by the omission of that inserted: 1 Williams on Executors, 203, 204, and cases cited in notes.

In 1 Story's Eq. Jur., sec. 179, it is said there is no doubt that courts of equity have jurisdiction to correct mistakes in wills when they are apparent upon the face of the will, or may be made out by a due construction of its terms; for in cases of wills the intention will prevail over the words. But then the mistake must be apparent on the face of the will, otherwise there can be no relief; for, at least since the statute of frauds, parol evidence, or evidence *dehors* the will, is not admissible to vary or control the terms of the will, although it is admissible to remove a latent ambiguity.

But the mistake, in order to lead to relief, must be a clear mistake, or a clear omission, demonstrable from the structure and scope of the will: 1 Story's Eq. Jur., sec. 180. The mistake must be clearly made out, for if it is left doubtful, equity will not interfere: *Id.*, sec. 181; and see cases cited in note 2.

In 2 Roper on Legacies, 1456, it is said that although courts of equity are in the habit of correcting errors and mistakes in bequests, yet that the exercise of its jurisdiction is to be resorted to with great caution. If the mistake be not clearly

demonstrable, but is merely presumptive or conjectural, and can in any way be reconciled with the rest of the will, the court will not correct the supposed mistake; for it is a rule of construction that mistakes in a will are never to be intended, if a reasonable construction can be found out.

It is essential to the validity of a bequest or devise that the subject of the gift be capable of ascertainment: 2 Roper on Legacies, 1450. If, therefore, the testator, by mistake, wrongly describe the nature or quality of the gift, or omit to describe it altogether, in such cases the bequest or devise will in general be void, unless by reference to other parts of the will the mistake or omission can be supplied or explained: Id.

In *Freeman v. Freeman*, 8 Vin. Abr., tit. Devise, 51, pl. 21, the description of the nature of the subject of the gift was, by mistake, omitted altogether. The bequest was to testator's daughter A, five hundred and fifty, omitting the word "pounds;" but immediately following there was a bequest to the daughter B, of five hundred and fifty pounds. It was contended that the legacy to A was void for uncertainty; but the chancellor, Lord Cowper, held that the subsequent bequest to B explained and supplied the omission, and clearly showed the intention to give five hundred and fifty pounds to A, and that the bequest was as good and the description as certain as if the word "pounds" had been expressed.

From the foregoing authorities, we think the omission in the will under consideration may be supplied. The mistake, it will be observed, consists simply in the omission to state the subject of the gift, which was plainly intended to be the remaining half of his tract of land. The mistake is apparent upon the face of the paper, without resorting to extrinsic evidence. The omission, in the language of Mr. Story, is "demonstrable from the structure and scope of the will," and it "cannot in any way be reconciled with the rest of the will."

Nothing can be more clearly established, from the face of the will, than that the testator intended to dispose of all the property he possessed, of every description; and it is equally clear that he supposed that he had done so by the will. The will upon its face shows what property he owned. All the personal property, including slaves and choses in action, is specifically bequeathed. One half of his tract of land is also devised, specifically, to his son, Turner B., in his own right; the omission, therefore, to dispose of the other moiety of the land, where the intention to dispose of all his estate is so fully

manifested, is such an "absurdity or ambiguity on the face of the will" as, according to the authorities before referred to, would, perhaps, let in extrinsic evidence to remove it. But the present case does not call for the introduction of extrinsic evidence to remedy the mistake.

The face of the will itself not only demonstrates the mistake, but likewise furnishes the evidence by which the palpable omission may be supplied.

We have the incomplete clause in the will, formerly written, so far as it goes, demonstrating the purpose and intention of giving some other property (not disposed of in the will as it stands) to Turner B. Eatherly, in trust for Dolly C. Young for life, with remainder to her children. What property was intended to be given by this clause? The will itself answers this question—it was the other moiety of the land; for the will disposes specifically of everything else he possessed; and the remaining half of the land, not in terms disposed of, as the will now stands, is therefore the only subject which the unfinished clause of the will could, by possibility, have contemplated.

It is not admissible to suppose that the testator caused this clause to be framed, without really intending thereby to make any gift for the benefit of his daughter and her children. We are consequently forced to the conclusion that the subject of the gift was, by inadvertence, unintentionally omitted.

And as the intention to dispose of all his property is manifest, and yet, in fact, part of the land is not in terms disposed of, the conclusion is inevitable that the subject of the gift, omitted in the clause referred to, was the moiety of the land.

Upon any other hypothesis, it is impossible to reconcile the intention of the testator with the facts appearing upon the face of the will.

It will, therefore, be decreed that the omission be supplied, and the will reformed accordingly.

Decree of the chancellor reversed.

REFORMING AND CORRECTING WILLS IN EQUITY: See *Goode v. Goode*, 66 Am. Dec. 630, and extended note thereto 633–637, where various points of the *syllabus, supra*, are discussed, and cases cited.

INTENTION OF TESTATOR IS POLAR STAR in determining the construction of his will: See note to *Tolar v. Tolar*, 14 Am. Dec. 576.

EXTRINSIC EVIDENCE TO EXPLAIN WILL: *Avery v. Chappel*, 16 Am. Dec. 53, and note 58; *Mann v. Mann*, 7 Id. 416; *Comstock v. Hadlyme Society*, 24

Id. 100; note to *Wilson v. Fossett*, 39 Id. 743; note to *Barnes v. Summa*, 49 Id. 441; *Gifford v. Dyer*, 57 Id. 708, and note 709.

TO EXPLAIN LATENT AMBIGUITY IN WILL, extrinsic evidence is admissible: *Brownfield v. Brownfield*, 51 Am. Dec. 590, and note 594; *Breckenridge v. Duncan*, 12 Id. 359.

NASHVILLE AND CHATTANOOGA R. R. Co. v. ELLIOTT.

[1 COLDWELL, 611.]

RAILROAD COMPANY, AS COMMON CARRIER, IS LIABLE AS INSURER for the safe transportation of goods and of the baggage of passengers.

LIABILITY OF RAILROAD COMPANY FOR INJURY TO PASSENGER IS, that the company is held bound to the highest degree of care and diligence; and is responsible for all injuries to passengers resulting from the slightest negligence or want of skill or prudence.

SERVANT OR EMPLOYEE OF RAILROAD COMPANY, WHO VOLUNTARILY ENGAGES TO SERVE IT, is presumed to know that there are extraordinary dangers inseparable from such service, which human care and foresight cannot guard against.

EMPLOYEE, WHO VOLUNTARILY ENGAGES TO SERVE RAILROAD COMPANY, in view of all the hazards to which he will be exposed, undertakes, as between himself and his employer, to run all the ordinary risks of the service; and this includes the risk of injuries, not only from his own want of skill or care, but likewise the risk of injuries from the negligence of his fellow-servants. But this doctrine is subject to the qualification that the employer must take care not to expose the servant to any risk, by associating him with other servants wanting in ordinary skill or care, or by the use of unsafe or unsuitable machinery, or by other culpable negligence.

RAILROAD COMPANY IS NOT LIABLE FOR INJURY TO EMPLOYEE, WHEN.—A railroad company is bound to see that its road is in good order, and safe; and that the engines, etc., are perfect and properly constructed according to the present state of the art; and to have competent and prudent engineers. If the road and machinery are safe and perfect, and by accident the locomotive runs off the track and injures a servant of the company, the latter, in the absence of any fault or negligence on their part, will not be responsible for such injury.

RAILROAD COMPANY IS LIABLE FOR INJURY TO EMPLOYEE, WHEN.—Where a locomotive, by accident, runs off the track and injures a servant of the railroad company, the latter is liable to the servant for such injury if it was occasioned by any imperfection in the road or machinery, of which the company had knowledge, or of which they, in the exercise of ordinary care, might have known; or by associating the servant with other servants wanting in ordinary skill or care; or by other culpable negligence on the part of the company.

RAILROAD COMPANY IS OBLIGED TO SEE THAT ENGINES AND APPARATUS ARE SUITABLE, SUFFICIENT, and "as safe as care and skill can make them." This general doctrine is regulated by the proportion and importance of the business, and the perils incident to it. But if an engine, though not constructed according to the latest model, is shown to be safe, and as well adapted, in all respects, to the service, as one of more recent invention, but of different construction, it is sufficient.

NOTICE TO AGENT IN TRANSACTIONS FOR WHICH HE IS EMPLOYED, and within the scope of the authority confided to him, is notice to the principal, and applies equally to a corporation as to a natural person.

IF ENGINEER OF RAILROAD COMPANY KNOWS THAT ROAD OR MACHINERY IS DEFECTIVE, his knowledge is knowledge of such defect on the part of the company.

INFANT MAY MAKE SOME CONTRACTS WITH THIRD PERSONS, which will be binding until avoided by him, or until the parent asserts his paramount authority to put an end to the contract by reclaiming the services of his minor child. A contract for the infant's benefit is one of this kind.

INFANT'S CONTRACT TO SERVE RAILROAD COMPANY AS EMPLOYEE IS VALID, as between himself and the company; and want of the previous consent of the parent does not avoid it. It remains good until either the parent or his minor child puts an end to it.

WHERE SEVERAL SERVANTS ARE EMPLOYED IN COMMON SERVICE, and one of them suffers an injury by the neglect or want of care of another, while they are jointly engaged in the same service, he cannot recover against the employer for such injury, in the absence of any fault on the latter's part.

CASE. The facts are stated in the opinion.

Frank Estell and Arthur S. Colyar, for the plaintiffs in error.

Peter Turney and John Spurlock, for the defendant in error.

By Court, MCKINNEY, J. This was an action on the case, brought by Elliott to recover damages for an injury to his person while in the employ of the company. Judgment was rendered in his favor for two thousand dollars.

It appears that Elliott had been employed by the company, at thirty dollars per month, as a hand on a locomotive-engine known as the Cumberland; and his business was to pass wood from the tender to the fireman. This engine was kept and used for the purpose of pushing freight trains up the Cumberland mountain at the tunnel, the grade on both sides being very heavy. On that part of the road on which this extra service was rendered, there was a curved embankment of some twelve or fourteen hundred feet in length; and a breach having been made in the embankment by a flood, a trestle-frame bridge was placed therein, of some one hundred and fifty feet in length. The bridge, it seems, was placed some little distance out of the old track; in consequence of which, especially at one end, the curve "was made harder," and perhaps more difficult for trains to pass from the embankment onto the bridge. Shortly after the completion of the bridge, the engine Cumberland, in pushing a freight train, immediately after getting on the bridge, ran off the track and fell over, kill-

ing the fireman, and inflicting injuries upon Elliott, by which he is, to some extent, disabled for life.

Two grounds of recovery were assumed: 1. That the injury was occasioned by the imperfect construction of the bridge; and 2. That the engine, from its construction, was not adapted to run safely in a curve.

The Cumberland was what is called "an eight-wheel connected engine," without trucks, weighing nearly thirty tons. The weight of the proof is, that it was a first-class and perfect engine of its kind. But there is some conflict in the proof as to its adaptedness to the particular purposes for which it was used. The proof is satisfactory, on the one hand, that an engine of this construction is peculiarly suited for heavy freight trains, where there are high grades to be overcome, because of the greater adhesion of the wheels to the iron rails; and because, likewise, such an engine can be run backwards with as much ease and safety as forwards; and that, in both these respects, it has greatly the advantage of a four-wheel engine with trucks. But on the other hand, the weight of the proof seems to be that the latter kind of engine is safer and better adapted for running over curves; that the trucks follow the curve and guide the engine with greater facility and certainty than the larger wheels of the former kind of engine, which, from the construction of the machine, have but a slight lateral motion, and consequently incline to pursue a straight line. Upon this point, however, the proof is conflicting, and facts are stated by some of the witnesses, purporting to be the result of actual experiments, which tend to show that the Cumberland had followed curves which ordinary four-wheeled engines, with trucks, had failed to do without running off.

It is shown in the proof that the Cumberland was procured for this particular service, and that it had been thus used for a period of two years or more, before the accident referred to, without any complaint, so far as we learn from the record, that it was in any respect unsuited to the service, or at all unadapted to any curvature of the road.

Upon the whole record—if the question of fact were open for our determination—we should hesitate to say that the company had been guilty of any such negligence or fault, either as respects the construction of the bridge or the engine, as would entitle Elliott, as their employee, to maintain his action.

But the facts have been settled by the jury, and if the

instructions of the court shall be found unexceptionable, we are not at liberty to disturb their verdict.

It should be stated that the engineer who conducted the locomotive at the time it ran off the bridge, and who had been employed in that capacity for some five months before, was examined as a witness for the plaintiff. He stated that the engine's running off was not by reason of any negligence on his part, or of the other hands. He further stated that, after the bridge was completed, he had run the engine over it, safely, five times, and in crossing the sixth time it fell off; that there is a difference in running on wet and dry rails; that when the rails are wet the friction is less, and "the engine will slip round the rails more easily;" that in crossing the bridge the first four times the rails were wet by rain, and the fifth time he wet the rails before crossing; but the last time, when the engine ran off, he omitted to do so, though the rails were dry.

In considering this case, it must be borne in mind that the servant of a railway company, who receives an injury while in the performance of the duties of his service, stands upon a very different footing from a passenger traveling on the train, as regards the liability of the company. Although railway companies are not held liable as insurers of the safety of passengers as they are as common carriers of goods, and of the baggage of passengers, yet the rule in regard to the degree of care and vigilance exacted from them, as laid down in several cases, is an extremely rigorous one. They are held bound to the highest degree of care and diligence, and are answerable for all injuries to passengers, resulting from the slightest negligence, or want of skill or prudence: *Redfield on Railways*, c. 17, sec. 1, and notes; *Philadelphia etc. R. R. Co. v. Derby*, 14 How. 483.

But as to the servants of the company, the rule is different. The servant, on entering into the service, knows, or is taken to know, that there are extraordinary dangers inseparable from such a service, which human care and foresight cannot always guard against. He is not bound to incur these known perils, incident to the service, and may refuse to do so; or he may, as far as can be done, provide for them, in the rate of compensation or otherwise. But if he voluntarily engages to serve, in view of all the hazards to which he will be exposed, it is well settled that, as between himself and his employer, he undertakes to run all the ordinary risks of the service;

and this includes the risk of injuries, not only from his own want of skill or care, but likewise the risk of injuries from the negligence of his fellow-servants. This doctrine, however, must be taken with the qualification that the employer must take care not to expose the servant to any risk by associating him with other servants wanting in ordinary skill or care, or by the use of unsafe or unsuitable machinery, or other culpable negligence: Redfield on Railways, c. 17, secs. 1-3, and notes.

Having stated these general principles, we proceed to notice the exceptions to the instructions of the court.

The court, in substance, stated to the jury that the company were bound to see that the road was in good order and safe, and that the engines, etc., were perfect and properly constructed, according to the present state of the art; and also to have competent and prudent engineers; that if the road and machinery were safe and perfect, and the locomotive by accident ran off the track, and caused an injury to the plaintiff, the company, in the absence of any fault or negligence on their part, would not be responsible. But if the injury was occasioned by an imperfection in the road or machinery, the company would be responsible for it; provided the latter had knowledge of such defects, or in the exercise of ordinary care might have known it. The court further stated that if either the road or machinery was defective, and that fact was known to the engineer, that would be knowledge on the part of the company.

It is supposed the court erred in holding that the company were bound to see to it that their engines and machinery were perfect, and constructed according to the present improvements in the art. In support of this exception, we are referred to the note of a late English case, cited in Redfield on Railways, 695, which holds, according to the note, that when an injury happens to a servant in the use of machinery in the course of his employment, it will not render the master liable that he has in use in his works an engine or machine less safe than some other in general use.

The facts of the case to which this principle was applied are not stated in the note; and all that need be said of it is, that such a principle cannot be admitted as applicable to railway companies. The principle laid down in the charge is sustained by several authorities. The general doctrine is, that in proportion to the importance of the business, and the perils

incident to it, is the obligation of the company to see that the engines and apparatus are suitable, sufficient, and "as safe as care and skill can make them:" *Hegeman v. Western R. R. Co.*, 16 Barb. 353, cited in *Redfield on Railways*, c. 17, sec. 1, in notes.

To be sure, if the engine in question, though not constructed according to the latest model, were shown to be safe, and as well adapted in all respects to the service as one of more recent invention of different construction, that would be sufficient. And the charge is not incompatible with this view; it assumes that the latter possesses advantages over the former in regard to safety or otherwise.

The next exception to the charge is the principle stated by the court, that the company was chargeable with knowledge of a defect in the road or machinery possessed by an engineer in their employ.

This objection is not tenable. The established rule that notice to an agent in the transactions for which he is employed, and within the scope of the authority confided to him, is notice to the principal, applies equally to a corporation as to a natural person: *Angell & Ames on Corporations*, 299, 301.

In general, the only mode in which a corporation aggregate can act is through the intervention of agents, either specially designated by the act of incorporation, or appointed and authorized by the corporation in pursuance of it: *Angell & Ames on Corporations*, 256. And the corporation is responsible for the acts of the agent; and of necessity, the knowledge of a fact by the agent, directly connected with the duties of the business confided to his care, must be chargeable to the corporation: *Id.* 302; *Redfield on Railways*, 380.

The tendency of the course of decision is to give the agents of railway companies a liberal discretion, and to hold the companies liable for their acts within the most extensive range of their chartered powers: *Redfield on Railways*, 380. And it has been suggested with much plausibility that, in respect to corporations, the legal entity should be regarded as virtually always present in the person of any of the employees, within the range of the employment: *Id.* 384, 385.

The proof shows that the plaintiff, Elliott, was under the age of twenty-one years at the time of receiving the injury. It appears, however, that at the time of entering the service of the company he was the head of a family, having a wife and one child.

On the trial, much stress seems to have been laid on the fact of the plaintiff's minority, as taking the case out of the operation of the ordinary principles governing the liability of railway companies for injuries to persons in their employment. Upon this point, his honor instructed the jury that if the plaintiff was under the age of twenty-one at the time of his contract to enter into the service of the company, the contract "was void, and not binding on him, and would not place him in the attitude of an employee;" and "if the defendants took him upon their road to labor, and whilst there, by the negligence of its agents, or defects in the road or machinery, the plaintiff was injured, the defendant would be responsible for it." Such his honor stated to be the law, unless it were shown "that the plaintiff had a father living, and that he permitted him to act for himself;" that the father's consent to the contract would be necessary "to make him an employee" of the company.

This instruction, in the unqualified terms in which it is stated, is not correct. It is certainly true that a father has the legal right to the control and services of his child until he attains the age of twenty-one years; but it by no means follows from this that an infant is incapable, under any circumstances, of making a binding contract without the express consent of his parent. It is well settled that, notwithstanding the general incapacity of infants to enter into absolutely binding contracts, yet they may make some contracts which will be binding, at least until avoided by them—such as contracts for their benefit. The rule upon this subject, as laid down in *Keane v. Boycott*, 2 H. Black. 511, has been frequently approved by this court: See cases in 1 Meigs's Dig., sec. 1116. It is this: "That when the court can pronounce the contract to be to the infant's prejudice, it is void; and when to his benefit, as for necessities, it is good; and when the contract is of an uncertain nature, as to benefit a prejudice, it is avoidable only at the election of the infant:" 2 Kent's Com. 193.

A contract of apprenticeship, it is said, is generally to be regarded as for the benefit of an infant, and therefore he may make a legal, binding contract of apprenticeship: *Dias v. Freeman*, 4 T. R. 196; *King v. Arundel*, 5 Mau. & Sel. 257. So it is held a contract of hiring and service may be beneficial to an infant, and would, generally speaking, be binding upon him, and may be made even with his own father: *King v. Chillesford*, 4 Barn. & Cress. 94; *Smith's Master and Servant*,

6; 2 Law Lib., 6th ser.; *Wood v. Fenwick*, 10 Mee. & W. 195. This doctrine is not to be questioned. It does not, of course, counteract the father's right to the services of his infant child, or his right to reclaim the custody and services of the infant, who may have hired himself to another with the parent's consent. But it is clear that, as between the infant and the third person, the contract of hiring and service is not rendered inoperative and void, on the part of the infant, merely for want of the previous consent of the parent. It remains binding until avoided by the infant, or until the parent asserts his paramount right to put an end to it, by reclaiming his minor child.

Hence it follows that the plaintiff, by his contract with the company, so long as he assented to it, was as fully in the condition of a servant or employee of the latter as if he had been of full age.

The charge being clearly erroneous in assuming that Elliott did not stand in the relation of servant to the company, we need not stop to comment on the different measure of liability supposed to rest upon the latter, on this mistaken assumption.

There is another matter in the case which deserved to have been submitted to the jury. Assuming it to be true, as the proof tends to establish, that an engine of the construction of the Cumberland was, in all respects, better adapted to the special service for which it was procured and used, namely, pushing freight trains up a heavy grade, than any other kind of engine yet invented, except in the singular particular of not following a curve with as much facility or safety; and assuming also (as the testimony of the engineer would seem to warrant) that this difficulty might have been, in whole or in part, obviated by wetting the rails—now, if the engineer, whose duty it was to have taken this precaution, if necessary, neglected to do so, it would have been a proper inquiry for the consideration of the jury, whether this negligence of the engineer caused or contributed to the running off of the engine. And if this were so, the case would be governed by the principle before alluded to, that where several servants are employed in a common service, and one of them suffers an injury by the neglect or want of care of another, while they are jointly engaged in the same service, he cannot recover against the employer for such injury, in the absence of any fault on his part, because the injury was occasioned by the negligence of his fellow-servant, and not of the employer; the hazard of injury, not only from his own want of proper care and vigilance, but

on the part of his fellow-servants, also, being one of the risks which, as between himself and employer, he is supposed to have taken upon himself by the contract. The case, however, in this aspect, was not submitted to the consideration of the jury.

If it were impossible for the company to procure an engine exactly fitted for all the purposes in view, then it was their solemn and imperative duty to select one of such model as, on the whole, would be safest, as respects human life. To this consideration, all others must be made to yield, at whatever sacrifice in a pecuniary point of view.

For the error in the charge, in regard to the effect of the plaintiff's minority, we feel constrained to reverse the judgment, and award a new trial.

COMMON CARRIER IS LIABLE AS INSURER for safe transportation of goods and baggage of passengers: *Powell v. Mills*, 64 Am. Dec. 158; *Transportation Co. v. Tiers*, Id. 394, and note 412; *Fergusson v. Brent*, 71 Id. 582, and collected cases in note thereto 587; *Welsh v. Pittsburgh etc. R. R. Co.*, 75 Id. 490, and cases collected in note to same 497; and this is the liability of a railroad company: *Dill v. South Carolina R. R. Co.*, 62 Id. 407.

CARRIERS OF PASSENGERS ARE NOT INSURERS of their safety, but are liable for negligence: See extended note to *Hegeman v. Western R. R. Corporation*, 64 Am. Dec. 525; *Galena etc. R. R. Co. v. Fay*, 63 Id. 323, and cases collected in note thereto 333.

CARRIERS OF PASSENGERS ARE BOUND TO EXERCISE HIGHEST DEGREE OF CARE, and are liable for the slightest negligence: *Galena etc. R. R. Co. v. Fay*, 63 Am. Dec. 323, and collected cases in note to same 333; note to *Bowen v. New York Central R. R. Co.*, 72 Id. 532.

RAILROAD IS BOUND TO KEEP ITS ROAD AND MACHINERY IN GOOD ORDER and to adopt safe means to prevent accidents: *Vicksburg etc. R. R. Co. v. Patton*, 66 Am. Dec. 552; *Pennsylvania R. R. Co. v. Aspell*, 62 Id. 323, and note 327; *Galena etc. R. R. Co. v. Fay*, 63 Id. 323; *Curtis v. Rochester etc. R. R. Co.*, 75 Id. 258. As to company's obligation to introduce improvements, etc., see *Smith v. New York etc. R. R. Co.*, 75 Id. 305, and note 310; *Curtis v. Rochester etc. R. R. Co.*, Id. 258; but a carrier is not liable for latent defects of such a character that no skill, care, or foresight could have detected their existence: See note to *Hegeman v. Western R. R. Corporation*, 64 Id. 528.

LIABILITY OF MASTER FOR INJURY TO SERVANT BY NEGLIGENCE OF FELLOW-SERVANT: See *Washburn v. Nashville etc. R. R. Co.*, 75 Am. Dec. 784, and note 789; *Smith v. New York etc. R. R. Co.*, Id. 305, and note 310, containing collected cases; *Cox v. Keahey*, 76 Id. 325; extended note to *Murray v. S. C. R. R. Co.*, 36 Id. 279-290.

SERVANT ASSUMES RISK INCIDENT TO SERVICE, ETC.: See *Noyes v. Smith*, 65 Am. Dec. 222, and cases in note to same 225; *Illinois Central R. R. Co. v. Cox*, 71 Id. 298; extended note to *Murray v. S. C. R. R. Co.*, 36 Id. 281.

NOTICE TO AGENT IS NOTICE TO PRINCIPAL, while the former is acting within his authority: See note to *Weisser v. Denison*, 61 Am. Dec. 739; *Farmers' etc. Bank v. Payne*, 68 Id. 362 and note 367.

GROSS NEGLIGENCE OF MASTER IN NOT KNOWING DEFECTIVE CONDITION OF LOCOMOTIVE, whereby servant is injured, will make him liable: *Noyes v. Smith*, 65 Am. Dec. 222, and note 226.

INFANT MAY CONTRACT TO FURNISH HIS LABOR TO ANOTHER: See note to *Stons v. Dennison*, 23 Am. Dec. 659; and the fact that an injured servant is a minor does not affect his legal rights, where he has received injuries while in the service of a railroad company: See note to *Murray v. S. O. R. R. Co.*, 36 Id. 282.

THE PRINCIPAL CASE WAS CITED in each of the following authorities, and to the point stated: The only mode in which a corporation aggregate can act is through the intervention of their agents: *Louisville etc. R. R. Co. v. Garrett*, 8 Lea, 449. A contract of a personal kind, or relating to personal property, whether executed or executory, may be avoided under age and immediately: *Lancaster v. Lancaster*, 13 Id. 181. The principal case is referred to in *Guthrie v. Railroad*, 11 Id. 379, as giving the rule governing an employer's duty as to machinery used in his business. In the same case, and on the same page, after stating the rule that the servant takes the risks inseparable from his employment, Redfield's qualification of the rule is stated as in the principal case. On page 380 of the same case, the true rule as to the duty of the master is said to be that it is absolute to use active diligence to prevent improper or unsafe tools or implements being furnished an employee, by which he may be injured. The servant on entering into service knows, or is taken to know, that there are extraordinary dangers inseparable from such service, which human care and foresight cannot always guard against; and an employee, as between himself and his employer, undertakes to run all the ordinary risks of the service, and this includes the risk of injuries from the negligence of his fellow-servants: *Nashville etc. R'y Co. v. Handman*, 13 Id. 426.

CASES
IN THE
SUPREME COURT
OF
TEXAS.

DELMAS v. MARGO.

[25 TEXAS, 1.]

GRANTING OR REFUSING NEW TRIAL IS IN DISCRETION OF COURT, where party's own witness testifies in such manner as to surprise the party calling him, after due caution used to learn what he will establish on the trial.

NEW TRIAL WILL BE GRANTED WHERE PARTY SHOWING REASONABLE CARE AND DILIGENCE to provide himself with testimony to make out his case, using the ordinary caution of a prudent attorney in informing himself of the facts to which the witnesses will depose, is then disappointed by the testimony of his witnesses, so that an injury will result, which may be remedied by another trial.

ACTION to recover four hundred and forty-three dollars and thirty-two cents, on an account. On the trial, plaintiffs swore as a witness one S., sheriff of the county, who testified that when he served the process on defendant, and executed the writ of attachment, the defendant said: "Take what there is in my store; it is all I intend to pay Delmas" (plaintiff). That defendant then paid to one P. ten dollars, for which he brought to witness a receipt. Defendant said further, "that he owed Delmas; that he turned out the articles seized under the attachment voluntarily; that they and the ten dollars were all he intended to pay." Witness told defendant "that the ten dollars did not cover the claim of the plaintiffs." The defendant replied that "he knew it, but would not pay any more, and he had nothing more to pay with." The attached goods were appraised at one hundred and fifty-two dollars and twenty-three cents. No other testimony was offered to prove

the plaintiffs' claim. Verdict and judgment for defendant. Plaintiffs moved for a new trial, on affidavit of his attorney, on the ground that the affiant was surprised by the testimony aforesaid. The affidavit stated that on the morning of the trial the affiant had a conversation with the witness as to the testimony he would give, and he clearly understood from him that when service of process was made upon the defendant, he confessed to the witness the justness of plaintiffs' claim, and that he voluntarily turned out the goods, which were seized under the attachment, as part satisfaction of the debt. That the witness declined to testify to said facts on the trial. That relying on the sufficiency of the testimony he supposed the witness would give, affiant did not procure the attendance of one P. as a witness, by whom plaintiffs' claim can be completely established. The justness of plaintiffs' claim was sworn to, and affiant stated that on another trial they will be able to establish it. Motion for new trial overruled.

D. D. Atchison, for the appellants.

By Court, BELL, J. We are of the opinion that the court erred in overruling the motion of the plaintiffs for a new trial. We think that the affidavit of the attorney of the plaintiffs in support of the motion showed sufficiently that the attorney, without any lack of caution on his part, was misled by the witness Stewart. It is true that the affidavit does not state quite as distinctly as could be desired that the attorney of the plaintiffs had interrogated the witness previous to his examination in court, as to the precise extent of the acknowledgment of indebtedness made by the defendant at the time of the service of the attachment. But it is sufficiently shown, we think, that the attorney was led to believe, from his previous conversation with the witness, that the witness would testify that the defendant acknowledged himself indebted to the plaintiffs to the extent of their demand, as set forth in their petition and affidavit.

It is well settled that when a party's own witness testified in such manner as to surprise the party who calls him, after due caution has been used by the party who calls the witness, a new trial will be granted. If, for example, a witness assures a party that he will testify to an important fact in the case, and fails, upon examination in court, to do so; or when a witness has sworn to an important fact on a former trial, and upon a new trial being granted swears differently—in these

cases a new trial will be granted. For it is said that "witnesses sometimes, when interrogated in private, wholly mistake and at other times greatly exaggerate their knowledge of the facts in dispute, so that confidence is placed in them only to be betrayed when they come to testify under oath in court." 3 Graham & Waterman on New Trials, 953. In the case of *Wilson v. Brandon*, 8 Ga. 138, the judge who delivered the opinion of the court said: "Applications of this sort for new trials ought to be closely scrutinized so as to guard against the abuse of a rule intended for the advancement of justice; but where there has been, as in this case, a blameless mistake, and an injury to the party resulting from such mistake, a new trial, in our opinion, ought to be granted."

In all cases of this kind, it must, of course, rest within the discretion of the court to grant the new trial, or not. But where a party shows reasonable care and diligence to provide himself with testimony to make out his case, and uses the ordinary caution of a prudent attorney in informing himself of the facts to which the witnesses will depose, and is then disappointed by the testimony of his witnesses, so that an injury will result which may be remedied by another trial, the new trial will be granted.

For error in refusing to grant the new trial asked for by the plaintiffs, the judgment of the court below in this cause is reversed, and the cause remanded that a new trial may be had.

Reversed and remanded.

GRANTING NEW TRIAL ON GROUND OF SURPRISE is discretionary in the court below: *Sanford Manufacturing Co. v. Wiggin*, 40 Am. Dec. 198. When surprise not deemed sufficient ground for granting new trial: See *Riley v. City of Louisville*, 46 Id. 560; *Linard v. Crossland*, 60 Id. 213; *Clark v. Carter*, 58 Id. 485; *Stout v. Calver*, 35 Id. 438. Surprise is not ground for new trial when based upon ignorance of law: *Sanford Manufacturing Co. v. Wiggin*, 40 Id. 198; *Fuller v. Hutchings*, 70 Id. 746. And new trial on ground of surprise will not be granted, unless it appear that the moving party was injured by the surprise, and that, if a new hearing be granted, he can make out a good cause of action or defense: *Blake v. Howe*, 15 Id. 681. And allegation on motion for new trial that party was taken by surprise is not supported by the record when there is no affidavit of the fact, and nothing to show that he had employed due diligence to obtain evidence: *May v. Hanson*, 63 Id. 135, and note 138.

NATURE OF SURPRISE CONSTITUTING GROUND FOR NEW TRIAL.—Surprise deemed a sufficient ground for granting a new trial is defined to be "that which ordinary prudence could not have guarded against:" Cal. Code Civ. Proc., sec. 657; and see *Dewey v. Frank*, 62 Cal. 343; *Helm v. First National Bank*, 91 Ind. 44, 49; *Board of Regents v. Linscott*, 30 Kan. 240, 266; *Race v. Malony*, 21 Id. 31; *Haynes v. State*, 45 Ind. 424. And where a party by the

exercise of ordinary diligence might have avoided the effects of what he complains as the ground of his surprise, a new trial will not be granted on this ground: *Stewart Mining Co. v. Coulter*, 3 Utah, 174; *Landrum v. Farmer*, 7 Bush, 46; but any unexpected situation in which a party may be placed, without any default on his part, and which will be injurious to his interests, may be termed "surprise" entitling him to a new trial: *Oakley v. Sears*, 7 Robt. 111; and see *Hatfield v. Macy*, 52 How. Pr. 193; *Fretwell v. Laffoon*, 77 Mo. 26; *Platt v. Munroe*, 34 Barb. 291; such, for instance, as the sudden departure of a witness from court, the unexpected adverse testimony of the party's witness, and sometimes any unexpected testimony: *Oakley v. Sears*, 7 Robt. 111; and see *Egan v. Delaney*, 16 Cal. 87; *Sultan v. Sherwood*, 18 Nev. 454; *Russell v. Reed*, 32 Minn. 45. Thus where an original record was lost, and the party defeated was misled by a certified copy used on the trial, which was subsequently discovered not to conform to the original in important points, but the correctness of which he had no reasonable ground for disputing at the time, this was held to be a proper case of legal surprise for which a new trial might be granted, unless it was clear from the record that the errors complained of would not affect the result: *Farnham v. Jones*, 32 Minn. 7; and see *Goldstein v. Louther*, 81 Ill. 399. But the general rule is, that neither party is entitled to a new trial on the ground that he was surprised by the testimony of the adverse party: *Travis v. Barkhurst*, 4 Ind. 171; *Helm v. First National Bank*, 91 Id. 44; *Gardner v. State*, 94 Id. 489; *Delaney v. Brunette*, 62 Wis. 615; *Beal v. Coddling*, 32 Kan. 107, 112; *Dimmey v. Railroad Co.*, 27 W. Va. 32; *Atkinson v. Conner*, 56 Me. 546; *Blake v. Madigan*, 65 Id. 552; *Beckford v. Chipman*, 44 Ga. 543; *Whiteman v. Leslie*, 54 How. Pr. 494. Reliance upon the unsworn statement of an adversary's witness as to what will be his testimony is not the exercise of ordinary prudence; and surprise resulting therefrom, whereby a party goes to trial without witnesses to prove the real truth, is not ground for a new trial: *Pittsburgh etc. R. R. Co. v. Sponier*, 85 Ind. 165; and see *Kloedenbaum v. Pierson*, 22 Cal. 163; *Armstrong v. Davis*, 41 Id. 499. But where a party to a suit, in order to influence the action of his adversary, tells him that certain facts will not be controverted on the trial, and the latter relies on such statement and omits to produce witnesses to prove such facts, he may be entitled to a new trial on the ground of surprise which ordinary prudence could not guard against: *Haynes v. State*, 45 Ind. 424. So where a party in advance of the trial promises not to call a particular witness, and his adversary, in reliance on the promise, neglects to subpoena impeaching witnesses, the calling of such witness in violation of the promise is such a surprise as will justify the court in granting a new trial: *Tyler v. Hoornbeck*, 43 Barb. 198; and see *Continental National Bank v. Adams*, 67 Id. 318.

SURPRISE AT TESTIMONY OF PARTY'S OWN WITNESS.—The mere fact that a party's own witness gives testimony different from what the party expected him to give does not furnish adequate ground for granting a new trial on the ground of surprise: *Guard v. Risk*, 11 Ind. 156; *Graeter v. Fowler*, 7 Blackf. 554; *Sproul v. Fire Insurance Co.*, 1 Lana. 71; *Estate of Cartery*, 56 Cal. 470; *Schultz v. Third Av. R. R. Co.*, 15 Jones & S. 285. But the cases agree, in accordance with the doctrine of the principal case, that a party may be entitled to a new trial on the ground of surprise, caused by his own witness testifying differently from what he had the right reasonably to expect, where no want of diligence in guarding against such surprise is attributable to him, and where it is shown that he is injured thereby: *Todd v. State*, 25 Ind. 212; *Oakley v. Sears*, 7 Robt. 111; *Wilson v. Brandon*, 8 Ga. 136; *Rodriguez v.*

Comstock, 24 Cal. 85. The application for a new trial should, however, be denied, where from the motion or the evidence it appears that the applicant did not use diligence to procure the evidence or to avoid the surprise: *Ex parte Walls*, 64 Ind. 461; *Rockford etc. R. R. Co. v. Rose*, 72 Ill. 183; there must have been no want of skill, care, or attention: *Hatfield v. Macy*, 52 How. Pr. 193; *Nelson v. Waters*, 18 Ark. 570. It is even held that the applicant for a new trial, on the ground of surprise at testimony given by his own witness, must show that he has used due diligence or care to direct the attention of the witness to the particular point of difference: *Howell v. Howell*, 37 Mo. 124. And it should appear that the consequences can be remedied on another trial: *Delmas v. Martin*, 39 Cal. 555; *Stellwagen v. Life Assoc.*, 14 Blatchf. 349. So it must be apparent that the party has not been guilty of laches in making his application, and that he has acted in good faith in omitting to apply for relief at an earlier stage in the proceedings: *Id.*; *Ames v. Howard*, 1 Sumn. 482; *Schweiker v. Raymond*, 6 Abb. N. C. 378; *Mehan v. Railroad Co.*, 55 Iowa, 305.

NEW TRIAL WILL NOT BE GRANTED ON GROUND THAT WITNESS MADE MISTAKE IN HIS TESTIMONY, except in peculiar and extraordinary cases: *O'Kelly v. Felker*, 71 Ga. 775; *Scofield Rolling Mill Co. v. State*, 54 Id. 635; nor is it ground for a new trial that a witness has testified without being sworn, unless it appears that the evidence was material and not true, and that the party against whom the witness testified was not guilty of laches in permitting him to testify without being sworn: *Sheeks v. Sheeks*, 98 Ind. 288.

MOTIONS FOR NEW TRIAL ON GROUNDS OF SURPRISE are addressed to the sound discretion of the trial court, and its action will not be disturbed, unless it is manifest that there was an abuse of such discretion: *Hill v. Denstlinger*, 61 Iowa, 240; *Coker v. State*, 20 Ark. 53; *Shepherd v. State*, 34 Id. 659; and see *Stewart v. Town of Dunlap*, 61 Iowa, 248; *Evans v. Rugee*, 63 Wis. 31; *Williams v. Montgomery*, 60 N. Y. 648; *Railroad Co. v. Hays*, 15 Neb. 224; *Sultan v. Sherwood*, 18 Nev. 454; *Lehi Irrigation Co. v. Moyle*, 9 Pac. Rep. 867 (Utah).

THE PRINCIPAL CASE IS CITED in *Laird v. Bass*, 50 Tex. 416, as authority sustaining defendants' motion for a new trial. Defendants' counsel was misled by the answers of a witness to his inquiries, before the trial, into the belief that there was no written evidence of the contract which he sought to prove by that witness. Counsel appeared to have used reasonable care and diligence in informing himself of the facts to which the witness would testify, and to have been misled by the mistake of the witness, the result being the exclusion of testimony material to the defense. It was held upon this showing, on the authority of the principal case, that defendants were entitled to a new trial.

McCoy v. STATE.

[25 TEXAS, 32.]

TERMS "PROOF IS EVIDENT OR PRESUMPTION GREAT," in Texas bill of rights, are intended to indicate the same degree of certainty, whether the evidence be direct or circumstantial. The design is to secure the right of bail in all cases except those in which the facts might show, with reasonable certainty, that the prisoner is guilty of a capital offense.

DEFINITION OF "EXPRESS MALICE" as given by Blackstone, adopted by court as correct, namely: "Express malice is, when one with a sedate

and deliberate mind, and formed design, doth kill another; which formed design is evidenced by external circumstances discovering that inward intention, as lying in wait, antecedent menaces, former grudges, and concerted schemes to do him some bodily harm."

OBJECT OF PROOF IS TO ESTABLISH ACTUAL MALICE TOWARDS DECEASED, at the time of the killing, which prompted the accused to the commission of the deed. Sufficiency of the evidence to establish it is determined, as that of any other fact, by its effect to reasonably satisfy the mind.

WHERE FACTS TEND TO ESTABLISH DIFFERENT CONCLUSIONS as to the kind of malice, whether express or implied, if fresh provocation intervenes between the preconceived malice and the death, it will not be presumed that the killing was upon the antecedent malice; but although it will not be presumed, it may be proved to have actuated the person in the killing, by the circumstances and facts in the case, notwithstanding the fresh provocation.

EXTERNAL FACTS AND CIRCUMSTANCES INDICATING DESIGN TO TAKE LIFE OF PERSON SLAIN may transpire at the time of the killing as well as before that time.

APPEAL ON a writ of *habeas corpus*. Appellant was indicted for the murder of one David Baltzell. It appeared from the record that the appellant was at the hotel where the killing occurred a short time previously, there being also present several other persons. In reply to a remark made by one, appellant remarked "that was the way my friend Dr. Brantley was killed here; that he had been here since yesterday evening, and intended remaining until the next evening; he had not been near that corner [pointing to Monroe's store], and did not intend to go there, for the reason that he did not want any of them to speak to him, and if they did, he would spit in their damned faces, and then they could murder him as they had his friend Dr. Brantley." After a pause he remarked aloud that "if they had any friends present, he wanted them to go and tell them not to come about him." In his remarks on the street, appellant also said that "the Monroes were damned cowards and damned murderers; that he could whip any of them; that they and the Baltzells had murdered his friend; and that he would rather lie in Brantley's grave than to speak to them;" and concluded by adding that "he was there, and if Monroe had any friends, they could go and tell them what he said." Soon afterwards, William Baltzell, brother of deceased, and a friend, entered the hotel, and information was communicated to David Baltzell that probably there would be a difficulty at the hotel. David Baltzell was seen to have a shot-gun ten or fifteen minutes before the difficulty, and going towards the hotel. Upon arriving at the hotel, he was informed of what appellant had

said in the evening, to which he replied that "if the difficulty came up, he would see it out." He was then armed with a pistol. Shortly afterwards, the parties met and joined in the fatal affray, thus described by a witness for the defendant: He (the witness) saw the appellant have his hand raised, holding in it, as he supposed, a pistol, in the attitude of striking, and William Baltzell was drawing his pistol. Appellant said, "Don't you speak to me, you damned murderer;" and just then (as witness thought) William Baltzell fired, and appellant struck, and just about the same time David Baltzell fired at appellant from behind, and was unseen by the latter. William Baltzell was stunned by the blow, and a struggle ensued between appellant and David Baltzell. No eye-witness testifies further than that, during the struggle, another pistol was fired, some one fell, appellant walked out with what a witness supposed to be a pistol in his hand, and David Baltzell was found dead, shot in the forehead by a large ball. A pistol was lying near him on the floor, and a slung-shot or colt was also picked up. Two persons went into the hall after the firing of the last pistol, and came out with appellant, and they went off together. It was not shown where appellant lived, what his business was there, who came with him, who were his associates, nor that any one else took part in the fight besides appellant and the two Baltzells. The district judge decided that the prisoner was not entitled to bail.

Parker and Miller, for the appellant.

Graham, attorney-general, for the appellee.

By Court, ROBERTS, J. Appellant was indicted in the district court of Gonzales county for the murder of David Baltzell; and having been brought before the district judge upon a writ of *habeas corpus*, and the evidence having been heard, it was decided that he was not entitled to bail; and from that decision an appeal was taken to this court.

The main question in the case is, whether or not the killing was upon express malice.

The amendment to the code established degrees in murder by the following provisions, to wit:

"Art. 608. All murder committed by poison, starving, torture, or with express malice, or committed in the perpetration, or in the attempt at the perpetration, of arson, rape, robbery, or burglary, is murder in the first degree, and all murder not of the first degree is murder of the second degree."

"Art. 612 a. The punishment of murder in the first degree shall be death, and the punishment of murder in the second degree shall be confinement in the penitentiary for not less than five years." O. & W. Dig. 534.

By the ninth section of the bill of rights in the constitution of the state of Texas, it is provided that "all prisoners shall be bailable by sufficient sureties, unless for capital offenses, when the proof is evident or presumption great:" O. & W. Dig. 14.

The terms "proof is evident or presumption great" are as definite to the legal mind as any words of explanation could make them; and are intended to indicate the same degree of certainty, whether the evidence be direct or circumstantial. The design is to secure the right of bail in all cases except in those in which the facts might show, with reasonable certainty, that the prisoner is guilty of a capital offense.

The code does not define what is meant by "express malice." But it is provided that "the principles of the common law shall be the rule of construction, when not in conflict with the penal code or code of criminal procedure, or with some other written statute of the state:" Pen. Code, art. 4; O. & W. Dig. 458. Recourse must, therefore, be had to the common-law authorities for the meaning of the term "express malice."

In every indictment for murder, the prisoner is charged with having, with malice aforethought, killed the deceased. The proof to sustain this charge, under the law, may or may not exhibit deliberate malevolence in the mind of the prisoner towards the person killed, though that may be the literal import of the charge in the ordinary acceptation of the terms used. Hence malice aforethought, when attempted to be defined, has been necessarily given a more comprehensive meaning than enmity or ill-will or revenge; and has been extended so as to include all those states of the mind under which the killing of a person takes place, without any cause which will, in law, justify, excuse, or extenuate the homicide: *Rex v. Harvey*, 2 Barn. & Cress. 268; 1 Hawk. P. C. 95; 1 Russell on Crimes, 482; Pen. Code, art. 607.

Hence, also, has originated the distinction between malice express and implied. The most complete and accurate view of the distinction between express and implied malice is to be found in Blackstone's Commentaries, which, it is believed, will be the better understood and appreciated in proportion to the research into other sources of information.

"Express malice is when one, with a sedate, deliberate mind, and formed design, doth kill another; which formed design is evidenced by external circumstances, discovering that inward intention, as lying in wait, antecedent menaces, former grudges, and concerted schemes to do him some bodily harm:" 4 Bla. Com. 198.

This description indicates: 1. The state of the mind at the time of the killing; 2. The design formed; and 3. The character of proof by which such formed design is to be discovered.

1. The person must be of sedate, deliberate mind. He must be sufficiently self-possessed as to comprehend and contemplate the consequences of his acts. His acts must not be the result of a sudden, rash, inconsiderate impulse or passion. This, when there was an intention to kill, might still be murder, but not upon express malice. Hence it is said: "If a man kills another suddenly, without any or without a considerable provocation, the law implies malice." 4 Bla. Com. 200; Hale P. C. 455, 456; 1 Russell on Crimes, 483; *Atkinson v. State*, 20 Tex. 530, 531; *Mitchell v. State*, 5 Yerg. 340.

2. The design formed must be to kill the deceased, or inflict some serious bodily harm upon him. This would indicate that the malevolence must be directed towards the deceased as its object.

Mr. Hawkins says that is most properly called express malice, when murder "is occasioned through an express purpose to do some personal injury to him who is slain in particular:" 1 Hawk. P. C. 96.

"Malice in fact (express) is a deliberate intention of doing some corporal harm to the person of another:" 1 Hale P. C. 451.

This design "is not confined to an intention to take away the life of the deceased, but includes an intent to do any unlawful act which may probably end in depriving the party of life:" Roscoe's Crim. Ev. 707; 2 Stark. Ev. 711. This specific malevolence towards the person killed may be embraced in such utter and reckless disregard of life, as shows a man to be an enemy to all mankind; as when a man resolves to kill the next man he meets, and does kill him; or shoots into a crowd wantonly, not knowing whom he may kill: 4 Bla. Com. 200. In such a case, it may well be said that he has malevolence towards the particular person killed, because he was one within the general scope of his malignity. The same may be said of

one or more persons who enter upon the commission of another felony, in such way as to show a preconceived resolve to kill or do great bodily harm to all or any one who may oppose the design:" 4 Bla. Com. 200.

If the formed design be not to kill the deceased, or inflict on him serious bodily injury, but to commit some other felony, the killing will not be on express malice. A attacking B with malice, shoots at him, but misses him and kills C, against whom he bore no malice: it is murder. This is not because of any malice in fact against C, but because of the evil design against B, which, it is said, is carried over against C by legal implication: 4 Bla. Com. 201. How far this instance may be modified by the provision of our code, it is unnecessary now to consider: Art. 49.

So if a person in attempting to commit robbery, arson, and the like, is violently resisted and kills the person resisting, he is guilty of murder, on implied malice, though he had no wish to kill the person who was slain; but merely to prevent himself from being injured: 1 Hale P. C. 465.

A case may be given under this head illustrative of the one now under consideration, in some of its features. "Several persons conspired to kill Dr. Ellis, and they set upon him accordingly; when Salisbury, who was a servant to one of them, seeing the affray and fighting on both sides, joined with his master; but knew nothing of his master's design. A servant of Dr. Ellis, who supported his master, was killed. The court told the jury that malice against Dr. Ellis would make it murder in all those whom that malice affected; as malice against Dr. Ellis would imply malice against all who opposed the design against Dr. Ellis; but as to Salisbury, if he had no malice, but took part suddenly with those who had, without knowing of the design against Dr. Ellis, it was only manslaughter in him. The jury found Salisbury guilty of manslaughter, and three others of murder; and the three others were executed:" 1 Russell on Crimes, 510. Hale, in his explanation of this case, says it is murder in those having malice against the master; "for the malice shall be carried over," so as to make the killing of the servant murder: 1 Hale P. C. 438.

These instances will suffice to explain the principle announced, that the malice must be towards the particular person who is killed, to make it express.

3. The character of proof by which such formed design is to

be discovered. Malice of all kinds must be inferred, because it consists in a quality or state of the mind, either actual or imputed. Its actual existence may be manifested by external circumstances, from which it may be reasonably inferred. In the absence of those external circumstances which make it manifest, it is in some cases imputed as a legal inference, without reference to whether it exists in fact or not. Hence it is said by Mr. Starkie: "Malice is either positive and express, or it is implied malice, or malice in construction of law. Malice of the former kind consists in an actual and deliberate intention unlawfully to take away the life of another, or do him great bodily harm, and the actual existence of such an intention is a question of fact, to be found and ascertained by the jury. Implied or constructive malice is not a fact for the jury, but is an inference or conclusion, founded upon particular facts and circumstances ascertained by them:" 2 Stark. Ev. 711.

Upon these different modes of arriving at the conclusion that there is malice, arises another consideration in the distinction between express and implied malice. "Malice in fact (express) is a deliberate intention of doing any bodily harm to another, whereunto by law he is not authorized. The evidence of such a malice must arise from external circumstances, discovering that inward intention; as lying in wait, menacings antecedent, former grudges, deliberate compassings, and the like, which are various, according to variety of circumstances:" Hale P. C. 451. These antecedent menacings, former grudges, deliberate compassings, and the like, are important, not as matters of aggravation in the quarrel or feud, so much as being facts from which the actual state of the mind may be inferred at the time of killing, and the design which prompted the act. These external circumstances, indicating the design; may transpire at the time of the killing as well as before that time. For although the killing be upon a sudden difficulty, it may be attended with such circumstances of enormity, cruelty, deliberate malignity, cool calculating compassings, or even calm demeanor and absense of passion, as will be sufficient evidence to establish the inference that the killing was the result of a sedate, deliberate mind, and formed design to take life or do some great bodily harm: *Jones's Case*, 1 Leigh, 612. Familiar cases given in illustration of this are, where a boy was tied to a horse's tail and dragged along and killed; where a master corrected his servant with an iron bar; where

a school-master stamped on his scholar's belly, etc.: 4 Bla. Com. 199. The antecedent circumstances, and those that are contemporaneous with the act of killing, may conspire to lend each other increased force in establishing this inference: *Hill's Case*, 2 Gratt. 603, 604. Acts and admissions, or other language of the prisoner, even after the mortal stroke or killing, may often be pertinent evidence, as tending to show express malice at the time of the killing: *Jones's Case*, 1 Leigh, 670.

In cases of sudden killing, in the absence of previous ill feeling, or where it is too slight to be presumed to be the motive for the act, there may often be found ample evidence of express malice in the means used, or manner of doing it. For a man is always presumed to intend that which is the necessary or even probable consequence of his acts, unless the contrary appears.

However sudden the killing may be, if the means used, or manner of doing it, or other external circumstances attending it, indicate a sedate mind and formed design to kill, or do great bodily injury, and a murder be committed, it will be upon express malice: 1 Hawk. P. C. 96, sec. 23. In such case, if it appeared that the means used were likely to kill, or do great bodily harm, endangering life, and a killing took place, the natural inference would be that it was upon express malice; unless it was attended with such circumstances as showed an absence of such formed design, or as showed the act to be the result of an indeliberate, rash, sudden impulse or passion: *Whiteford's Case*, 6 Rand. 723, 724.

The rule that from the isolated fact of killing the malice is implied, and not express, however correct as an abstract proposition, can seldom be of practical utility in ascertaining the species of malice: *Hill's Case*, 2 Gratt. 594; *State v. Turner*, Wright, 20; Am. Law Homicide, 386; *Pennsylvania v. Lewis*, Add. 279. For that fact will rarely ever be presented in the entire absence of all antecedent or attending circumstances. Whether they be arrived at by positive or circumstantial evidence, they will constitute a legitimate basis for an inference as to the species of malice. The fact that no one witnessed the act of killing will not necessarily make the rule applicable. In *Hill's Case*, *supra*, in Virginia, the evidence showed that the prisoner had, some time prior to the fatal transaction, taken umbrage at the decedent. His pride had been wounded. He asked the deceased to walk with him, as he wished to say something to him. He took the deceased

from the friends and company that surrounded him into the shade of the night. He had with him a sword-cane; and in the short space of between five and ten minutes, the deceased is seen returning from whence he started, and falls from a stab in the heart by an instrument such as that in the possession of the prisoner; and the prisoner, under the cover of the night, flies from his home and his country. These facts alone were held sufficient to warrant the inference of express malice: *Hill's Case*, 2 Gratt. 603, 604, 620.

These views will perhaps sufficiently explain the character of proof by which the "formed design" is discovered.

The object of the proof is to establish the existence of the malice in fact towards the deceased (as it has been explained) at the time of the killing, which prompted him to the commission of the deed. The sufficiency of the evidence to establish it is determined, as that of any other fact, by its effect to reasonably satisfy the mind.

There may be a case where there are facts tending to establish different conclusions as to the kind of malice; some to establish that the killing was upon express and others that it was upon implied malice. In such case, the only rules as to the effect of the evidence which it is now necessary to notice are: 1. That where "fresh provocation intervenes between the pre-conceived malice and the death, it will not be presumed that the killing was upon the antecedent malice;" 2. That though it will not be presumed, it may be proved to have actuated the person in the killing, by the circumstances and facts in the case, notwithstanding the fresh provocation: 2 Stark. Ev. 712; *Jones's Case*, 1 Leigh, 612-614.

It may be concluded, then, in determining whether a murder has been committed with express malice or not, the important questions are: Do the external facts and circumstances at the time of the killing, before or after that time, having connection with or relation to it, furnish satisfactory evidence of the existence of a sedate, deliberate mind on the part of the person killing, at the time he does the act? Do they show a formed design to take the life of the person slain, or do him some serious bodily harm which in its necessary or probable consequences may end in his death; or such general reckless disregard of human life as necessarily includes a formed design against the life of the person slain? If they do, the killing, if it amount to murder, will be upon express malice.

When the facts show with reasonable certainty that a mur-

der with express malice has been committed, bail should be refused.

We are of opinion that the facts as presented in the record in this case do not show with reasonable certainty that the prisoner is guilty of murder with express malice, and that therefore he is entitled to bail.

Bail allowed.

MURDER IS UNLAWFUL KILLING OF ANY PERSON WITH MALICE AFORETHOUGHT: *McWhirt's Case*, 46 Am. Dec. 196; *Commonwealth v. Webster*, 52 Id. 711; *Wall v. State*, 70 Id. 302.

DISTINCTION BETWEEN DEGREES OF MURDER: *Bower v. State*, 32 Am. Dec. 325, note 338; *State v. Smith*, 54 Id. 578; *Anthony v. State*, 33 Id. 143.

ON TRIAL FOR MURDER, EVERY REMARK AND WHOLE CONDUCT OF ACCUSED DURING INTERVIEW, which was concluded by the homicide for which he stands charged, are competent evidence as part of the *res gesta* to enable the jury to determine whether any crime has been committed, as well as to inform them as to its degree: *People v. Potter*, 71 Am. Dec. 763, and see note 769.

LEGAL PRINCIPLES OF PRINCIPAL CASE APPROVED AND APPLIED in *Drury v. State*, 25 Tex. 45.

THE PRINCIPAL CASE WAS FOLLOWED in definition of express malice in *Ake v. State*, 30 Tex. 473; *Farrer v. State*, 42 Id. 271; it is cited to the point that the design in express malice includes an intent to do any unlawful injury which may probably deprive the party of life, in *Duebbe v. State*, 1 Tex. App. 165; *Plasters v. State*, Id. 681; *Summers v. State*, 5 Id. 381; to the point that express malice may be shown by external facts and circumstances, in *Holden v. State*, 1 Id. 238; *Pocket v. State*, 5 Id. 567; *McKinney v. State*, 8 Id. 639, 644; *Wright v. State*, 41 Tex. 248; in drawing distinction between express and implied malice, in *Singleton v. State*, 1 Tex. App. 507; *Primus v. State*, 2 Id. 375, 376; *Jones v. State*, 3 Id. 155; *Roberts v. State*, 5 Id. 151; *Tooney v. State*, Id. 188, 189; *Richarte v. State*, Id. 363; *Harris v. State*, 8 Id. 109; *Rye v. State*, Id. 166; *McKinney v. State*, Id. 643; *Moore v. State*, 31 Tex. 573; *Sanders v. State*, 41 Id. 309; in distinguishing between murder in first and second degree, in *Hamby v. State*, 36 Id. 529; *Hudson v. State*, 40 Id. 16; *Burnham v. State*, 43 Id. 328; *Ferrell v. State*, 43 Id. 506; in construction of expression, "proof is evident or presumption great," as applied to bail, in *Ex parte Foster*, 5 Tex. App. 646; to the point that when a fresh provocation intervenes between preconceived malice and the death, it will not be presumed that the killing was upon the antecedent malice, etc., in *Murray v. State*, 1 Id. 421; to the point that if the means used were likely to kill or endanger life, and a killing took place, express malice would be inferred, unless the killing was attended with circumstances which showed an absence of formed design, in *Murray v. State*, Id. 422; *Aiken v. State*, 10 Id. 617, 618; to the point that the words "with malice aforethought" are sufficient in indictment, in *Perry v. State*, 44 Tex. 475; and to the point that express malice towards one will not render the unintentional killing of another, without malice, murder in the first degree, but in the second degree, in *Taylor v. State*, 3 Tex. App. 398.

STILLMAN v. CANALES.

[25 TEXAS, 512.]

VENDOR EXPRESSLY COVENANTING TO FURNISH VENDEE COMPLETE CHAIN OF TITLE for each of several parcels of land, and failing so to do, the vendee not to be bound to pay for those portions of the land for which he might be unable to furnish such title, is estopped from saying that his vendee has not been injured by his failure to perform such covenant; nor can he be heard to say that the title of his vendee has become invulnerable by lapse of time, or been perfected in any other manner.

SALE OF LAND BY VENDER, WITH OR WITHOUT WARRANTY, is not a waiver of an express condition, upon the performance of which alone the vendor was entitled to claim the payment of the purchase-money.

APPEALS from Cameron. Suits by appellees to recover from appellants the balance which they, respectively, claimed was due them by appellants, for the purchase-money of certain parcels of land. By consent, a jury was waived, and each of the causes was tried by the judge, and judgments given in favor of the plaintiffs. Other facts appear in the opinion.

Allen and Hale, for the appellants.

Daniel D. Atchison, for the appellees.

By Court, **BELL, J.** The appellee Manuel Travino Canales sold to the appellants six labors of land, forming a part of the "exidos" of the city of Matamoros. A part of the purchase-money was paid in cash at the time of the sale, and it was stipulated that the balance should be paid in three installments.

In one part of the indenture by which the sale and the agreement of the parties is evidenced, it is said that Manuel Travino Canales covenants, etc., "that he is now well and lawfully seised of all and each of the said granted tracts or labors of land by regular chain or transfers of title from the honorable ayuntamiento of the city of Matamoros, all of which transfers are hereby passed and made a part of this conveyance." In another part of the indenture, the appellee covenanted, "to cause to be done, made, executed, and performed all and every act or acts and conveyance or transfers of title which may be necessary in form or essence fully to perfect and assure to the said Stillman, Belden, & Mussina, their heirs and assigns, a perfect title of and to the said described lands from the original grantees of the honorable ayuntamiento of Matamoros." In another part of the indenture, the following language occurs: "It is further covenanted and agreed by

the said Manuel Travino Canales, that in case of failure on his part or his legal representatives to produce, furnish, and assure to the said parties of the second part, their heirs or legal representatives, perfect and complete transfers of title to all and each of said labors hereinbefore described, then in that event the said parties of the second part may deduct from the payments herein conditioned by them to be made such sum or sums as may be the equal proportion and relative value of the said parcels or parts of parcels of land so failed to be conveyed and titles perfected, as compared with the whole of six tracts conveyed."

It is shown by the evidence that the vendor, Manuel Travino Canales, failed to deliver to the purchasers, Stillman, Belden, & Mussina, any paper title of any kind, from the ayuntamiento of Matamoros to two of the six labors of land described in the indenture; and it is shown that these two labors, to which no paper title from the ayuntamiento was delivered to the appellants, were of as great or greater value than the other four. The district judge who tried the cause, and to whom it was submitted by the parties without the intervention of a jury, was of opinion that the true meaning of the covenants contained in the indenture, taken together, was that the vendor would procure and deliver to the vendees such paper title from the ayuntamiento of Matamoros as it had been customary for the ayuntamiento to extend to persons who were permitted to occupy lands forming a part of the "exidos" of the city. But the judge was further of opinion that the appellants had waived the right to insist upon the delivery to them by their vendor, of such paper title, as a condition precedent to the payment of the purchase-money, because they afterwards sold the lands to the other persons, without any warranty of title except as against persons claiming under themselves; and the judge held that the appellants were not entitled, because of such waiver, to any abatement of the purchase-money, because a perfect chain of title to the labors formerly occupied by Onofre Rebalcaba and Catarina Vela had not been furnished to them. The judge below also expressed the opinion that it would be unconscionable to permit the appellants to abate a portion of the purchase-money after they had sold the land at a greatly advanced price, and when they had suffered no damage because of the failure of their vendor to furnish the title papers according to the stipulation of the indenture.

We are of opinion that the court below erred in this view of the case. The district judge attached importance to the fact that the appellants had sold the land without full warranty of title, and intimates that his opinion might have been different if the sale by the appellants had been a sale with full warranty of title. Let us suppose that the appellants had not sold the land, but had continued to occupy it as the owners; could they not have resisted the collection of the purchase-money until their vendor had complied with his undertaking to furnish title papers? And in the event of the inability of their vendor to furnish the title papers, would they have been under any obligation to return to him those portions of the land to which the titles were not furnished? We think it would be as unconscionable in them to retain the land without paying for it as it would be to sell it and put the proceeds of the sale in their pockets and still resist the collection of the purchase-money. We are of opinion that the plain meaning of the covenants in the deed is, that the vendor bound himself to furnish a complete chain of title from the ayuntamiento of Matamoros down through himself to the vendees, and that if he failed to do so, the vendees were not to be held bound to pay for those portions of the land to which the vendor might be unable to furnish a complete chain of title. It is not for the court to undertake to say what motives influenced the appellants in stipulating that the title papers should be furnished to them. Their objects in making the purchase may have been such as rendered the delivery of the title papers to them a matter of the first importance. There is nothing in the testimony to show that they were not paying, or agreeing to pay, for the title papers as well as for the land and the possession of it. It is not shown that they have not already paid as much as the land was worth at the time of the purchase from the appellee. But these are considerations with which the courts need not concern themselves. Parties have the right to make their own contracts, and it is the proper business of the courts to give effect to them without inquiring whether they are favorable to this party or to that. The appellee having stipulated, in the most express terms, to furnish the title papers, he cannot be heard to say that his vendees have not been injured by his failure to deliver them; nor can he be heard to say that the title of his vendees has become invulnerable by lapse of time, or been perfected in any other manner. The plain answer to all such reasons why his vendees should

be compelled to pay the purchase-money is, that they undertook to pay when he furnished certain title papers, and that he has not performed his undertaking. We have been able to find no case which goes to the extent of holding that a sale by a vendee, in a case like the present, with or without warranty, is a waiver of an express condition upon the performance of which alone the vendor was entitled to claim the payment of the purchase-money.

The evidence, which was introduced without objection, shows that the vendor admitted to the agent of the vendees that he was under obligation, by the terms of the indenture, to furnish other muniments of title than those that had been furnished; and he stated that the titles from the ayuntamiento of Matamoros to the labors which had been occupied by Rebalcaba, and by Catarina Vela, were in existence, and he could procure them.

We are of opinion that, by the terms of the indenture between the parties, the appellee was not entitled to demand payment of the purchase-money of those portions of the six labors to which he had failed to furnish a complete chain of title. The judgment of the court below must therefore be reversed, and the cause remanded for a new trial.

Ordered accordingly.

Reversed and remanded.

THE PRINCIPAL CASE IS DISTINGUISHED in *Stillman v. Canales*, 39 Tex. 414, the pleadings not warranting the court in following the opinion in the former case. The doctrine of titles in the Spanish-American countries is ably discussed and clearly stated in *Strother v. Lucas*, 12 Pet. 436, 447, 449; affirming 8 C., 6 Id. 768.

GRANTOR IN DEED IS NOT ONLY ESTOPPED FROM DISPUTING DEED ITSELF, but every fact which it recites: *Stow v. Wyse*, 18 Am. Dec. 99; *Hall v. Benner*, 21 Id. 394; and all parties and privies, as a general rule, are estopped by recitals in deed: *Osborne v. Endicott*, 65 Id. 498; *Stevenson v. McReary*, 51 Id. 102.

ESTOPPEL OF GRANTOR TO DENY GRANTEE'S TITLE, arising from his deed, extends to all persons who claim from or under the grantor by title acquired subsequent to the grant, whether by deed or otherwise: *Gilliam v. Bird*, 49 Am. Dec. 379.

ESTOPPEL OF PERSONS CLAIMING UNDER COMMON SOURCE OF TITLE: See *Gilliam v. Bird*, 49 Am. Dec. 383, note.

CITY OF MARSHALL v. SNEDIKER.

[25 TEXAS, 480.]

RULE THAT MONEY PAID VOLUNTARILY, IN IGNORANCE OF LAW, but with knowledge of all the facts, cannot be recovered back, does not apply where the parties are not upon equal terms in the transaction.

LEGALITY OF CITY ORDINANCE REQUIRING PAYMENT OF MONEY FOR LICENSE TO RETAIL SPIRITUOUS LIQUORS, and imposing a heavy penalty for a violation, may be tested by party making payment in action to recover back the money.

WHERE CITY COUNCIL EXCEEDS ITS AUTHORITY IN MAKING TAX ASSESSMENT, and demands and receives more than the charter permits, which was paid under pressure of the summary remedies prescribed for collection, and of a heavy penalty for non-payment, it is against good conscience to retain the money, and action will lie to recover it back.

GENERAL POWER OF TAXATION WAS CONFERRED BY CHARTER UPON CITY COUNCIL, limited by the provisions: 1. That the tax on property should not in any one year exceed one half of one per cent *ad valorem* on such property; 2. That such tax should be apportioned in the same manner as the state tax: *Held*, that the assessment of corporation taxes upon occupations, under such charter, discriminating against an occupation in a degree beyond that made on such occupation by the legislature in the collection of state and county taxes, is unwarranted, and if enforced, the money so illegally exacted may be recovered back by the party injured.

ACTION against the city of Marshall for recovery of five hundred dollars alleged and admitted by the defendant to have been paid by plaintiff as a corporation tax imposed upon retailers of spirituous liquors. Plaintiff's petition alleged that said tax was imposed by city ordinance for the privilege of retailing spirituous liquors within the corporate limits of said city for twelve months, and that such tax, so imposed and collected, is out of proportion to the taxes imposed upon other occupations and citizens of said city, and was exacted and enforced in violation of the laws and constitution of the state. Defendant answered, filing a general demurrer and a general denial. A jury was waived, and the cause submitted to the court, and it was adjudged that the plaintiff recover the sum of three hundred and fifty dollars, and costs of suit. Other statements in the opinion sufficiently present the case.

W. P. Hill, for the plaintiffs in error.

P. Murrah, for the defendants in error.

By Court, ROBERTS, J. It is contended that the payment of the license tax imposed by the city was voluntarily made by the defendants, and that for that reason they cannot recover back the money so paid. It was collected off of the defend-

ants under color of lawful authority, in pursuance to an ordinance of the city council; which enjoined its payment under a penalty of twenty-five dollars a day for every day its violation was continued by retailing spirituous liquors. The act of incorporation gave to the city assessor the same remedies for the collection of taxes imposed by the city as the assessor of each county has for the collection of state or county tax. This subjected the defendants' property to seizure and sale in a summary manner by the assessor: O. & W. Dig., art. 1987.

Under these circumstances, the parties are not on equal terms. The ordinance of the city council required the defendants to obtain a license before retailing liquor, and imposed a heavy penalty for its violation. The defendants, by refusing to pay, would have placed themselves in the attitude of resisting the public authorities, and would have exposed themselves to the certain harassment of litigation, and to the great hazard of ruinous loss, if they should fail in that resistance. It is not contended in this case that the city council had no right to impose some occupation tax upon the defendants; but only that the tax of five hundred dollars was disproportioned to that imposed on other occupations, and was therefore excessive, unjust, and illegal. Still, they had to pay the whole amount to get the license which was required by the city ordinance. It has often been held, that if a party pay money voluntarily, in ignorance of law, but with a knowledge of all the facts, he cannot recover it back: *Billie v. Lumley*, 2 East, 469; *contra*: *Warder v. Tucker*, 7 Mass. 449 [5 Am. Dec. 62]; and see *Mowatt v. Wright*, 1 Wend. 354, 355 [19 Am. Dec. 508].

This rule cannot obtain, however, where the parties are not upon equal terms in the transaction. "If one party has the power of saying to the other, 'That which you require shall not be done except upon the conditions which I choose to impose,' no person can contend that they stand upon anything like an equal footing." Here, the defendants were merely passive, and submitted to pay the sum claimed, as they could not otherwise procure the license required by the city ordinance: *Morgan v. Palmer*, 2 Barn. & Cress. 319, 321.

If, also, the city council exceeded its authority in making this assessment of tax, and demanded and received from the defendants more than the charter permitted, and it was paid under the pressure of the summary remedies prescribed for its collection, and of the heavy penalty for retailing without its payment, it was against good conscience to retain it; and that

is an additional reason why the action for it can be maintained: *Brisbane v. Dacres*, 5 Taunt. 143.

The next important question in the case is, Did the city council have the right to impose this license tax of five hundred dollars? It is not necessary to call in question the constitutional power of the legislature of the state to invest a municipal corporation with the authority to levy and collect taxes, because we are of opinion that the charter did not authorize this assessment and collection. The facts show that the city council undertook to declare and enforce a public policy by discriminating against this occupation, in a degree far exceeding that of the legislature in the collection of taxes for state and county purposes. The state has indicated its policy in respect to the encouragement to be given to the various occupations liable to taxation, by apportioning the taxes upon each respectively. Retailers of spirituous liquors are required to pay annually two hundred and fifty dollars; those who keep a billiard-table, fifty dollars; an eating-house, sixteen dollars. The city council have not followed this apportionment, but imposed license tax on such retailers of liquor five hundred dollars; on billiard-tables, thirty dollars; and on eating-houses, fifteen dollars. Thus, while a billiard-table is taxed only three fifths of what it is taxed by the state, a retail liquor establishment is taxed double.

The act of incorporation prescribes "that the city council of the city of Marshall shall have and exercise the power of laying and levying taxes upon all subjects of taxation within the corporate limits upon which a tax may be levied by the state, as may be deemed necessary; provided that the tax on property shall not in any one year exceed one half of one per cent *ad valorem* on such property; provided, also, that such tax shall be apportioned in the same manner as the state tax."

The rule for the apportionment of taxes upon property is laid down by the constitution to be according to its value, except such property as two thirds of both houses of the legislature may think proper to exempt from taxation. The constitution leaves the apportionment of the taxable occupations entirely to the discretion of the legislature: O. & W. Dig. 25, sec. 27, Gen. Prov.

The legislature has exempted certain property from taxation, and has fixed the apportionment of taxes levied upon occupations. The object of the two provisos attached to the general power of taxation given to the corporation are: 1. To

limit the tax on property not exempt (which cannot be otherwise than *ad valorem*) at one half of one per cent per annum; and 2. To require the city council to follow the apportionment of occupation tax as indicated by the will of the legislature in the assessment of state tax. This is the natural construction, and gives greatest effect to all of the provisions of the section of the law in question. Indeed, if it be held that the second proviso refers alone to property tax, as contended for by counsel for plaintiffs, it can have no meaning or force whatever, unless perhaps in its application to exempted property. It would leave the city council with unlimited powers in levying and apportioning taxes on occupations. It might prescribe the public policy of the country within the city, at discretion, in building up one occupation by exemption, and in banishing another by the imposition of burdens in the shape of tax. The legislature should not readily be supposed to have conferred such powers upon any inferior municipal authority, nor indeed would it be so construed, except the language of the enactment plainly required it.

We think the meaning of the act plain and well expressed, and that it requires the city council, in assessing taxes on taxable occupations, to fix the same proportion between them as that fixed by the legislature for the state tax, thereby following the policy adopted by the whole state, and not that dictated by their own discretion: See cases bearing on this matter, *Robinson v. Mayor etc.*, 1 Humph. 160; *Mayor etc. v. Beasley*, Id. 241.

Upon this view of the law, it is presumed the case was adjudicated below. Whether or not it should have been determined that the ordinance of the city council imposing this excessive tax was utterly void for want of authority to assess it in the manner it was done, need not now be decided, as the defendants have not appealed or taken a writ of error from the judgment of the court below.

Judgment affirmed.

ACTION TO RECOVER BACK MONEY PAID UNDER MISTAKE OF LAW OR FACT: *Northrop v. Graves*, 50 Am. Dec. 264, and note 272; to recover back money obtained by fraud, duress, mistake, or tort: *Wells v. Brigham*, 52 Id. 750, note 758; recovery of money paid for void license: *Mayor of Baltimore v. Lefferman*, 45 Id. 166, note; recovery back of illegal taxes paid under compulsion: Id. 164, note; *Taylor v. Board of Health*, 72 Id. 724.

THE PRINCIPAL CASE IS CITED IN *City of Galveston v. Sydnor*, 39 Tex. 241, to the point that money collected as taxes by a city, under an ordinance not

authorized by its charter, may be recovered by suit at law, whether the tax was paid under compulsory process or not. It is cited in *G. G. Co. v. Co. of Galveston*, 54 Id. 292, as recognizing the doctrine that payment may be compulsory, although not made to relieve the person or goods from seizure or detention, actual or threatened, if made under circumstances creating a moral pressure of equal influence in perverting the free-will. And it is discussed and approved, but distinguished, in *Galveston Co. v. Gorham*, 49 Id. 306. As to the power of municipal corporations to levy local rates, taxes, and assessments, it is cited in *Perry v. City of Rockdale*, 62 Id. 454; and is cited and followed in *Blanc v. Meyer*, 59 Id. 92, as authority for refusing injunction to restrain collection of taxes

HOWETH v. ANDERSON.

[25 TEXAS, 557.]

LESSOR IS NOT LIABLE IN DAMAGES FOR ACCIDENTAL LOSS OF DEMISED PREMISES BY FIRE, under a covenant to redeliver them at the expiration of his term in as good order as when received, usual wear and tear and unavoidable accidents excepted.

CONTRACT OF LEASE IS NOT LIKE CONTRACT OF COMMON CARRIER, and is not governed in its construction, to the same extent, by considerations of public policy.

LEASES ARE CONSTRUED LIKE OTHER WRITTEN AGREEMENTS, so as to give effect to the intention, and in arriving at the intention, the subject-matter, the situation of the parties, and the object had in view and intended to be accomplished by the parties at the time are to be regarded.

ACTION for recovery of damages for the destruction by fire of a steam saw-mill, a quantity of lumber, a lot of tools, etc., alleged to have been rented from plaintiff by defendants, in consideration that defendants bound themselves to redeliver said saw-mill, etc., to plaintiff in as good order as they received them, excepting usual wear and tear, and unavoidable accidents, and to pay to plaintiff a certain sum as rent. Plaintiff's petition alleged the destruction of the saw-mill, etc., by fire through the neglect, carelessness, and actual imprudence of defendants. The court rendered judgment upon a special verdict against all the defendants for one thousand nine hundred and ninety dollars and fifty cents, and costs of suit. From which judgment defendants prosecuted this writ of error. Other facts more fully presenting the case appear in the opinion.

T. J. Jennings and M. H. Bonner, for the plaintiffs in error.

Donley and Anderson, for the defendant in error.

By Court, **WHEELER, C. J.** In order to determine whether the judgment has been rightly rendered for the plaintiff, we

must look to the case made by the petition and the special verdict.

In his petition, the plaintiff treats the defendants as his tenants rightfully in possession, and seeks to charge and hold them responsible for the injury and loss sustained, on the sole ground of carelessness, negligence, and mismanagement on their part, by which he avers the loss was occasioned. There is no averment in terms of a breach of the covenants in the lease; but the *gravamen* of the complaint is the negligence. The verdict does not support this ground of the action; on the contrary, it fully exculpates the defendants from the charge of negligence. The worst that the verdict establishes is, that the loss was caused by an accidental fire; and the question, as to the principal defendants or tenants in possession is, whether they are liable to make good a loss thus occasioned.

It is deducible from the petition, though it is not averred, that the defendants were holding over after the expiration of the lease when the loss occurred; and so the jury have found by their verdict. Thus continuing to hold, it was at the election of the plaintiff to treat them as trespassers, or as tenants holding under the terms of the original lease. The receipt of rent accruing after the expiration of the tenancy would evidence his election to treat them as tenants, and not as trespassers: Taylor on Landlord and Tenant, secs. 65, 465, 468; Story on Contracts, sec. 934. Whether we can look to the evidence of such receipt for rent in this case or not is not material, as the plaintiff in his petition has elected to treat the defendants as tenants, holding under the terms of the original lease. As such, are they liable for the loss of the premises by accidental fire? This question was considered in a very elaborate and learned opinion by the supreme court of New York, in the case of *Warner v. Hitchins*, 5 Barb. 666, upon a lease containing a covenant similar to the present, and it was there held that the tenant was not liable for a loss thus occasioned. The doctrine of this case is adopted by Mr. Taylor, in his learned treatise on the American law of landlord and tenant, where the law upon this subject is thus laid down: "When a tenant is under an express covenant to uphold and repair the premises, he is liable to make good all losses, and must even rebuild in case of casualty by fire or otherwise. . . . If he covenants to keep the premises in repair, and leave them in the same state as he found them, he is merely required to use his best endeavors to keep them in the same tenantable repair in which he found

them; for natural and unavoidable decay is no breach of this covenant. But if he covenants to repair generally, this will impose on him a liability to uphold the buildings, without regard to accidents, or the necessary decay of the old materials. Where he covenants to surrender the premises at the expiration of the lease, in the same condition they are in at the date of the lease, natural wear and tear excepted, but without any covenant to repair or rebuild, he is not bound, in case the buildings are destroyed by fire during the continuance of the term, to put up new buildings in the place of those destroyed:" Taylor on Landlord and Tenant, sec. 357.

Here, there was no covenant to repair; but the covenant of said tenants was "to redeliver said mills," etc., "in as good order as they received them, excepting usual wear and tear and unavoidable accidents." According to the authorities cited, it is clear that upon this covenant the defendants were not liable for the accidental loss of the premises by fire. I think it may at least be questioned whether the terms "unavoidable accidents," inserted in a covenant of lease like the present, would not include the exception of such losses as the verdict of the jury shows the present to have been. It is not like the contract of a common carrier, nor governed, in its construction, to the same extent, by considerations of public policy. Leases are construed, like other written agreements, so as to give effect to the intention of the parties. To arrive at the intention, regard is to be had to the situation of the parties, the subject-matter of the agreement, the object which the parties had in view at the time, and intended to accomplish. A construction should be avoided, if it can be done consistently with the tenor of the agreement, which would be unreasonable or unequal; and that construction which is most obviously just is to be favored, as most in accordance with the presumed intention of the parties: *Warner v. Hitchins*, 5 Barb. 669; *Halloway v. Lacy*, 4 Humph. 468. Looking to the terms and subject-matter of the contract, we do not think it reasonable or fair to conclude that the parties contemplated that the lessors were to become insurers of the property against those casualties which ordinary prudence and foresight could not have guarded against; or that it was supposed or intended that they were to become liable to repair the loss in case of the accidental destruction of the property by fire without negligence or fault on their part. The plaintiff did not frame his petition in any such view of the contract or the liability of the defendants,

and we do not think it was the view which the parties had of their rights and liabilities in entering into the contract. It would have been a very extraordinary liability for the lessee to assume; and if intended, it would doubtless have been clearly expressed in the lease. We conclude that, upon the facts found by the jury, the defendants were not liable to make good the loss of the property, and consequently that there was error in giving judgment for the plaintiff upon the verdict.

The defendant Broom has relied upon the further defense that he was but a surety upon the contract of lease; but as the maintenance of the defense of his principals necessarily relieves him from liability, it is unnecessary to consider the grounds of his separate defense. The view we have taken of the case would lead to the rendition of judgment for the defendants upon the verdict. But as that might deprive the plaintiff of having the case revised upon the evidence, as he might have done had the judgment been adverse to him in the court below, and he might suffer an injustice by the case taking a direction which he was not bound to anticipate, the judgment will be reversed, and the cause remanded for further proceedings.

Reversed and remanded.

EFFECT OF DESTRUCTION OF DEMISED PREMISES BY FIRE on tenant's liability for rent: *Stocheell v. Hunter*, 45 Am. Dec. 220, note 225; *Wall v. Hinds*, 64 Id. 64.

WHERE LESSEE COVENANTS TO KEEP DEMISED PREMISES IN REPAIR, and at the termination of the lease surrender them in as good condition as they were at its date, in the event of the destruction of the buildings by fire during the term, and without his default, he is bound to rebuild: *Abbey v. Billups*, 72 Am. Dec. 143, and note 148.

CONSTRUCTION OF WRITTEN INSTRUMENTS: See *Menard v. Scudder*, 56 Am. Dec. 610; *Chapman v. Glassell*, 48 Id. 41; *State v. Page*, 40 Id. 608; *Abbott v. Gatch*, 71 Id. 635.

MONROE v. SMELLY.

[25 TEXAS, 586.]

COLLECTION OF MONEY WON AT "TEN-PINS" will not be enforced by the courts.

COMMON-LAW RULE THAT ACTION WILL LIE ON WAGER, though parties have no previous interest in the subject of the wager, is subject to qualifications that no action will lie on wager contrary to public policy, or immoral, or in any respect tending to public detriment, or if it affects the interests, feelings, or character of third person.

IDLE WAGERS, AND ALL GAMING CONTRACTS, may be properly held to be void.

THE opinion states the case.

Taylor and Moore, for the appellant.

By Court, BELL, J. This suit was instituted by the appellant against the appellees, upon a promissory note for one thousand and fifty dollars, given by the appellees to one Robert Hale, and transferred by Hale, after maturity, to the appellant. The defendants in the court below pleaded that the note was given for money won at a game called "ten-pins." The evidence fully sustained the plea, and the presiding judge instructed the jury as follows: "If the jury believe from the evidence that the note read in evidence was given for money bet and lost at a game of ten-pins, it cannot be collected by law."

The only question before us arises upon this charge of the court. In obedience to it, the jury found a verdict in favor of the makers of the note, and in favor of Monroe against Hale, by whom the note was indorsed. We have given the subject the most deliberate consideration, and our conclusion is, that there is no error in the charge of the court below.

It is true that by the common law of England an action could be maintained on a wager, although the parties had no previous interest in the question on which it was laid. But this proposition was always subject to qualifications. These qualifications were, that an action could not be maintained on a wager if it was contrary to public policy, or immoral, or in any other respect tended to the detriment of the public; or if it affected the interests, feelings, or character of a third person. It will at once be perceived that these exceptions to the general rule are of a nature to admit of great diversity of opinion as to the circumstances under which the rule itself ought to be upheld. These exceptions, or to speak more correctly, the rule and the exceptions taken together, are founded upon a principle which enables the law to adapt itself to the changing circumstances and conditions of communities and states. And it is perhaps the greatest glory of the common law that it is, in its truest sense, both conservative and progressive in its tendencies. The exceptions to the general rule of the common law on the subject of wagers fall into two classes: one class is based upon a concern for the interest of the public; the other is based upon a concern for the interests and feelings of individuals. In a merely political sense, a thing may be said to be contrary to public policy in one gen-

eration which is not so in the next. And when the law institutes an inquiry into the morality or immorality of a particular thing, the inquiry does not proceed upon abstract principles so much as upon the received and common opinion of the great body of the people constituting the political community upon which the law has its operation. So a thing, in contemplation of law, may be immoral to-day which was not immoral fifty years ago. That may be held to be in strict conformity with sound morals, according to the public sense of the present day which would have been condemned as immoral during the ascendancy of the Puritans in England, and of the Covenanters in Scotland.

On many subjects, the law has never been declared by legislative enactments. It is supposed to rest in reason, and the courts have been left to apply the principle of sound reason to cases as they have arisen. The subject now under consideration, the extent to which actions of law could be maintained on wagers, is one upon which the legislatures of common-law states have shown a disposition to follow the lead of the courts, and the decisions of the courts have, as nearly as possible, kept pace with public opinion—sometimes lagging behind, out of too great regard for precedents, and sometimes taking the lead when an extraordinary case would quicken the judicial mind. In the year 1777, the case of *DaCosta v. Jones*, Cowp. 729, was tried before Lord Mansfield. The case arose about a bet upon the sex of the somewhat celebrated Chevalier D'Eon, a Frenchman, whose career had attracted public attention, and who chose to preserve as much mystery as possible in relation to his sex, which had become a subject of much interest in certain circles in the capitals of London, Paris, and St. Petersburg. On the first trial of the cause, the plaintiff obtained a verdict, on the evidence, in three hundred pounds. The trial had proceeded upon the former precedents upon the subject of wagers, in the English courts. There was a motion in arrest of judgment, which came on to be heard the next year. In the mean time, the case had "made a great noise all over Europe." The powerful mind of the great judge who had presided at the trial was directed to the principles involved in the case, and in delivering his opinion upon the motion to arrest the judgment, he overwhelmed the plaintiff's case in a torrent of argument that has made the opinion a landmark in the law. He expressed his regret that on the trial the nature of the case had not been more fully considered, and that the witnesses had not

been told that they might refuse to give evidence. He said that to sustain the action would be a disgrace to judicature, and that one's confidential friends and servants and physicians could not be required to give evidence upon such a question as was involved in the determination of the wager.

One of the earliest English cases on the subject of wagers, of which we have a report, was a case in which a wager was laid that Charles Stuart would be king of England within twelve months then next ensuing. Upon this wager, the action was maintained. This case is reported under the name of *Andrews v. Herne*, in 1 Lev. 33, and under the name of *Walcot v. Tappin*, 1 Keb. 56-65. In allusion to this case, Justice Buller, in the celebrated case of *Good v. Elliott*, 8 T. R. 693, said: "I presume no one will say that an action could now be maintained on any bet of that kind."

The English courts, however, still sustained actions upon wagers on the most frivolous matters, notwithstanding the effort of Buller, J., in the case of *Good v. Elliott*, *supra*, to treat all idle wagers as void. At a latter day, in the case of *Henkin v. Guerres*, 2 Camp. 408, Lord Loughborough refused to try an action for a wager, whether a person could be held to bail on a special original for a debt under forty pounds, and the court of king's bench approved what he had done: *Henkin v. Guerres*, 12 East, 247. The case of *Brown v. Leeson*, 2 H. Black. 43, was the wager concerning the manner of playing an illegal game, and the court refused to sustain the action, because the inquiry was concerning a prohibited game. But Lord Loughborough said in addition: "This was a mere idle wager, and I have no hesitation in saying that I think a court or a jury ought not be called upon to decide such wagers." In the year 1824, the case of *Egerton v. Furzeman*, 1 Car. & P. 613, came up in the king's bench, before Lord Chief Justice Abbott. The wager in that case was upon a dog-fight. The chief justice said: "I certainly shall not try the case. I am of opinion that the time of the court is not to be wasted in trying which dog or which man won a battle, as the whole of these wagers are illegal."

These references will serve to show the fluctuations and the general course of English decisions on the subject before us. Even some of the later cases, in which actions have been sustained in the English courts, would seem very clearly to sanction immorality. Thus in the case of *Bland v. Collett*, 4 Camp. 157, the wager was whether a person with whom the

plaintiff had conversed was Lord Kensington. The defendant, before he concluded the bet, ascertained for a certainty that the person was Lord Kingston, and not Lord Kensington; but the wager was held to be good. At length, in England, the legislature came to the relief of the courts, and by statutes 8 & 9 Victoria, all contracts and agreements, whether by parol or in writing, by way of gambling or wagering, are declared to be null and void; and it is provided that no suit shall be brought or maintained in any court of law or equity for recovering any sum of money or valuable thing alleged to be won upon any wager, or which shall have been deposited in the hands of any person to abide the event on which any wager shall have been made.

We are informed by Chancellor Kent, in his Commentaries, that wager policies of insurance, without any real interests to support them, are condemned by positive ordinances in France, and in most of the commercial nations of Europe. In Scotland, no wager or gaming contract will support an action: 1 Bell's Com. 300.

In the United States, the course of decisions on the subject of wagers has been very much the same as in England, with a stronger tendency in the later adjudication to treat all idle wagers as utterly void. Thus it has been held that a wager on a subject in which the parties have no pecuniary interest is not a valid contract in New Hampshire: *Perkins v. Eaton*, 8 N. H. 152; *Hoit v. Hodge*, 6 Id. 104 [25 Am. Dec. 451]; *Clark v. Gibson*, 12 Id. 386. All wagers are held to be void in the state of Maine: See *Lewis v. Littlefield*, 15 Me. 233. An action cannot be maintained in Pennsylvania to recover a sum of money alleged to have been lost by the defendant to the plaintiff upon a wager or bet: *Edgell v. McLaughlin*, 6 Whart. 176; *Phillips v. Ives*, 1 Rawle, 37; *Pritchett v. Insurance Co.*, 3 Yeates, 463. In the case reported in 6 Whart. 176 [*Egdel v. McLaughlin*], Sergeant, J., said that "courts of justice are instituted to determine the disputes among men necessarily arising from their existence together in society. In the innumerable contentions that human affairs originate, there is sufficient to engross the time and labor of judicial tribunals, without occupying them in the investigation of gratuitous contests, such as wagers, which flow sometimes from a spirit of gambling, sometimes from heat of passion, and sometimes from folly and indiscretion on the one side, and stratagem and cunning on the other." In Massachusetts, it is held that all

gaming is unlawful, according to the general policy and laws of the commonwealth. Even in Vermont it is held that no suit will lie to recover property won of another by a bet or wager: *Collamer v. Day*, 2 Vt. 144. See also the dissenting opinion of Bennett, J., in the case of *State v. Croteau*, 23 Id. 14 [54 Am. Dec. 90]. In the case of *Rice v. Gist*, 1 Strobb. L. 82, Judge O'Neill delivered the opinion of the court, and said in the most emphatic language: "I am prepared hereafter to declare all wagers unlawful, on their clear immoral tendency, and thus to sweep from our courts the whole body of wagers, great and small." In another part of the opinion that distinguished judge said: "Every bet, of this or any other kind, tends directly to beget a desire of possessing another's money or property without an equivalent. Men acted on by such influences may easily become gamblers, and then the road to every other vice is broad and plain."

But it is unnecessary to make further reference to the American decisions. The uniform tendency of the later decisions is to treat all gaming contracts and all wagers as utterly void. We feel ourselves authorized to conform our decisions to the public policy and to the sense of morality which the modern decisions and the modern legislation on the subject of gaming and wagers so clearly indicate. We find that the ancient rule of the common law was subject to certain exceptions; and in proportion as the courts have considered these questions, these exceptions to the ancient rule have been adjudged to be more and more comprehensive in their embrace, until, as has been said, the exceptions to the rule have taken the place of the rule itself. We think that in the true spirit and meaning of the exceptions to the old rule, all idle wagers and all gaming contracts may be properly held to be void.

1. Because it is contrary to sound public policy that courts of justice should be required to enforce contracts into which there does not enter the element of a good or valuable consideration, in the just sense of these words. What consideration is it for the payment of a thousand dollars that one man shall leap farther than another at three leaps? If A agrees with B that he will pay him a thousand dollars if a certain horse belongs to C, but if the horse belongs to B, then B shall pay A the like sum, where is the consideration of such a contract? There can be no consideration but the mutual risk to which each party subjects himself. And can it be said to be sound public

policy to permit parties to take such risks upon such trifling and frivolous issues? We think not.

2. We think that it certainly tends to the detriment of the public that the time of the courts should be consumed in the investigation of the most idle or frivolous matters, about which the parties who lay the wager have no interest, to the delay of causes of the greatest magnitude perhaps, and certainly to the delay of the ordinary business transactions of life.

Lastly, because a great majority of wagers are immoral in their tendency, in a plain and direct sense; and they all beget a desire, as was said by Judge O'Neill, to possess another's money or property without an equivalent, and this, if not an immorality in itself, opens the way to vice. It might not attract much attention for this court to render a judgment against a man for a thousand dollars lost at ten-pins, or on the turn of a card, or on the issue of a fight between two dogs; but if a dozen such judgments should be rendered at every term of this court for the next five years, it would be a blot upon the jurisprudence of the state, from which it would not recover in half a century; and it might present to the people the spectacle of the courts prostituted to the odious instrumentality of stripping women and children of the common comforts of life because some one who owed them support and protection had been capricious enough to stake his substance upon a wager that he could throw a stone a thousand feet. In the case of *Conner v. Mackey*, 20 Tex. 747, this court held that money won at a game with cards called poker could not be recovered, and the decision was put on the general ground that gaming with cards tends to immorality. See also the case of *Norvell v. Oury*, 13 Id. 31. We can perceive no difference in principle between the case of *Conner v. Mackey*, *supra*, and this case. It is true that the game of ten-pins is a licensed game, but it is not licensed for the purpose of gambling. The whole of our legislation on the subject of gaming shows that it has always been the policy of this state to prohibit and to punish it. We cannot see, therefore, that a wager upon a game licensed by law, stands on any different footing from a wager upon any indifferent matter.

This court has sustained wagers upon horse-races, upon the idea that they rested upon somewhat different grounds, as respects their policy, from other wagers. It may be too late to question the wisdom and soundness of those decisions. But we are not disposed to go any further in sustaining actions

upon wagers, or to recover money or property won upon any game or wager. The judgment of the district court is therefore affirmed.

Judgment affirmed.

NOTE FOR MONEY WON AT GAMING IS VOID, even in hands of *bona fide* assignee: *Williams v. Judy*, 44 Am. Dec. 699; and see *Haight v. Joyce*, 56 Id. 311; and bill of sale of goods lost at gaming-table is absolutely void: *Hockaday v. Willis*, 40 Id. 606; so, note given for a bet on an election is void: *Russell v. Pyland*, 36 Id. 307; and see *Jeffrey v. Ficklin*, Id. 456; *Hickerson v. Benson*, 40 Id. 115; *Tarleton v. Baker*, 44 Id. 358; *Bettis v. Reynolds*, 55 Id. 417; when wager is lawful or unlawful at common law: *State v. Smith*, 33 Id. 134, note; *Johnson v. Fall*, 65 Id. 518. Gaming is prohibited by statute in California, and the consideration for a debt contracted thereat is illegal as between the parties, and as to all persons except *bona fide* holders without notice: *Fuller v. Hutchings*, 70 Id. 746. The New York statute to prevent betting and gaming gives the party to a wager an unconditional right to recover his stake from the stake-holder: *Storey v. Brennan*, 69 Id. 629. Wagers on horse-races are not illegal in Texas: *Dunman v. Strother*, 46 Id. 97.

WILLIAMS v. DURST.

[25 TEXAS, 667.]

ACTION FOR MONEY PAID WILL NOT LIE AGAINST MAKER OF NOTE at suit of payee who indorses the note and afterwards pays and takes it up. His remedy is upon the note, and not upon an account for money paid to the use of the maker.

STATUTE OF LIMITATIONS COMMENCES TO RUN, in action by indorser against maker of note, if suit is brought upon the note, not from the time of payment, but from the time when the note is due and payable.

ACCOMMODATION INDORSER OF NOTE, PAYING IT, CANNOT RECOVER OF MAKER ON MONEY COUNTS, but must sue on note; and if the note be barred by the statute of limitations, he cannot recover, although he may have paid the amount to the holder before the bar of the statute had interposed.

EXECUTION AND CONTENTS OF WRITTEN INSTRUMENT, set forth in plaintiff's petition and relied on as a mortgage, cannot be proved by oral testimony tending to show that defendant had stated that he had executed to plaintiff a mortgage.

SECONDARY EVIDENCE OF CONTENTS OF MORTGAGE WILL NOT SUPPORT VERDICT AND JUDGMENT OF FORECLOSURE where such evidence fails to connect the mortgage with the debt it was alleged to have been given to secure, or to show upon what account or to secure what debt it was given.

ERROR from San Augustine. Suit by John Durst against plaintiff in error, as administrator *de bonis non* of the estate of one Kellogg, deceased, on an account against said estate for thirty-four thousand three hundred and seventy-three dollars and fifty-five cents, by him paid, which he had presented to

said administrator for approval, and was by him rejected. Plaintiff alleged that Kellogg, in his life-time, with two others, were indebted to one Prescott in the sum of eighteen thousand three hundred and thirty-two dollars and fifty-two cents. That said debtors of Prescott, in order to secure the payment of said sum to Prescott, applied to the plaintiff to become their security to said creditor; and to induce his consent, Kellogg promised him a mortgage upon a large amount of property to indemnify him against such liability, so to be contracted for their benefit. Plaintiff consented to become their security to Prescott, and accordingly said debtors of Prescott made their four several notes, payable to the order of the plaintiff for the sums respectively of three thousand and fifty-five dollars and forty-two cents, two of them for the same sum precisely, both due twelve months after date; the other two notes for the sum of six thousand one hundred and ten dollars and eighty-four cents each, due fifteen and eighteen months after date, and each bearing ten per cent interest per annum, and dated the twenty-eighth day of April, 1838, which notes, plaintiff alleged, at the special interest and request of Kellogg, he indorsed and delivered to Prescott. The petition further alleged that to secure the plaintiff against liability from said indorsements, Kellogg made to plaintiff a mortgage, a copy of which the petition set out, reciting and describing the four notes and the indorsements thereof, as above set forth. Plaintiff alleged the failure of the makers to pay the notes, and that by reason thereof he was forced to, and as indorser thereof did, pay the same with interest, amounting to the sum of thirty-four thousand three hundred and seventy-three dollars and fifty-five cents; and prayed for judgment for the acknowledgment of his claim against the estate for said sum of money, as money paid and advanced by the plaintiff for the use and benefit of said Kellogg, and that an account be taken by the court to determine the amount which should appear to be due; also for an account to be had of the rents and profits of the buildings included in the mortgage, and for a foreclosure of the mortgage, and decree of sale of the lots. Defendant answered by demurrer; the general issue; a plea of the statute of limitation of two years, and of four years; and a special answer. The question as to the bar of the four years' statute of limitation, as applied to the mortgage, was presented by the demurrer as a special ground of exception. On the trial, plaintiff offered as evidence and read his account against the estate of Kellogg, and proved its

presentation to the defendant as administrator for allowance a few days before bringing suit, and his refusal to allow the account was indorsed thereon. Plaintiff offered the deposition of one Borden, to the effect "that A. G. Kellogg, in 1838, told him that he had mortgaged the lots on which the brick church is situated to John Durst." Defendant objected, "because it was an attempt to establish by parol testimony what the petition alleged was in writing, to wit, the mortgage." Objection overruled by the court, and the evidence admitted. Plaintiff read in evidence the notes, to which defendant objected, and objection overruled. The judge charged the jury that "if you are satisfied from the testimony that the plaintiff's intestate, John Durst, paid for the defendant's intestate, A. G. Kellogg, as indorser of his note or notes, the money described or claimed in the petition, or any part thereof, find for plaintiff the amount so paid, unless you are satisfied from the testimony that more than two years elapsed from the time of said payment to the time of the filing the petition in this case. If so, find for the defendant. If the plaintiff has produced the notes, it is *prima facie* evidence of payment by plaintiff; and if he was the indorser of the notes, it is sufficient evidence to prove payment in the absence of testimony to the contrary. But if there is contrary evidence, find as you are satisfied, from the testimony as applicable to the case, you should find." Plaintiff asked the court to charge, "that if the jury found from the testimony that any of the lot or lots, or all of them, were mortgaged as alleged, to find for the plaintiff as to the lot or lots so proved." Refused. Defendant asked court to charge the jury, "that to entitle the plaintiff to recover, they must be satisfied that Durst was a surety on the notes, as alleged." Refused. Verdict for plaintiff for thirty-four thousand three hundred and seventy-three dollars and thirty-seven cents. Plaintiff died after commencement of suit, and Harriet M. Durst being the administratrix, and now plaintiff, judgment was rendered in her favor against the defendant as administrator of Kellogg, deceased, for the sum above specified to be paid in due course of administration. Defendant moved for a new trial, upon the grounds that the court erred in overruling the exceptions of defendant; in admitting the testimony of Borden; in its charge to the jury; in refusing the charge asked by defendant; that the verdict of the jury was contrary to the law and charge of the court; and was contrary to and without sufficient evidence. Motion overruled. Other statements appear in the opinion.

T. W. Jones, for the plaintiff in error.

Moore and Walker, for the defendant in error.

By Court, WHEELER, C. J. The plaintiff, in instituting his suit upon an account for money paid for the use of the defendant's intestate, proceeded on the ground that he was an accommodation indorser of the notes mentioned in the petition, and paid them as surety for the makers. And the charge of the court appears to proceed upon the same idea. But this is not the case made out in evidence. There is no evidence that Durst indorsed the notes for the accommodation of the makers. They are made payable to his order, and by him indorsed in blank. If by his indorsement he transferred the notes, and afterwards paid and took them up, he then stood in reference to the maker in the same attitude as if he had never parted with them. His remedy was upon the notes, and not upon an account for money paid to the use of the maker, and it cannot be doubted that the statute of limitation would bar the right of action at the expiration of four years from the maturity of the notes. The contract between the maker and payee or first indorser is, that the former will pay the note according to its tenor and effect. The obligation is created by the contract; the right of action is upon the contract; and the statute of limitations will bar the action of the payee against the maker, although the former, after the expiration of the period of the statutory bar, paid the note, and thus became repossessed of it: *Woodruff v. Moore*, 8 Barb. 171.

Even in the case of an accommodation indorser of a promissory note, it has been held that if he pay the note he cannot recover from the maker upon the money counts, but must sue on the note; and if the note be barred by the statute, he cannot recover, although he may have paid the amount to the holder before the bar of the statute had interposed: *Kennedy v. Carpenter*, 2 Whart. 844; Angell on Limitations, sec. 100. In the case of an accommodation acceptor of a bill of exchange, it has been held that the statute begins to run from the time of payment: *Id.* But it is plain that the payee of a note who does not appear to have indorsed it for the accommodation of the maker, which is the case here, has his right of action only upon the note, and the statute begins to run from its maturity. Upon the evidence, the action plainly was not maintainable upon the account for money paid; and if the suit had been upon the notes, the statute commenced to run, not from the time

of payment, but from the time when the notes respectively became due and payable. The law of the case was misconceived by the court in the charge to the jury, and in the ruling refusing a new trial.

A new trial ought to have been granted upon another ground. The deposition of the witness Borden was not competent proof of the execution and contents of the mortgage. If the affidavit of its loss by the attorney was a sufficient foundation for the introduction of secondary evidence of its contents, still the evidence wholly fails to connect the mortgage with the notes in question, or to show upon what account, or to secure what debt, it was given. It was manifestly insufficient to support a verdict and judgment for the foreclosure of the mortgage.

The judgment is reversed, and the cause remanded for further proceedings.

Reversed and remanded.

ACTION FOR MONEY PAID TO PARTY'S USE, WHEN IT LIES: *Ticonic Bank v. Smiley*, 46 Am. Dec. 593; *Neale v. Newland*, 38 Id. 44, note.

OPERATION OF STATUTE OF LIMITATION UPON NOTE PAYABLE ON DEMAND: See *Smith v. Bythewood*, 33 Am. Dec. 111; *Mudd v. Harper*, 54 Id. 644.

SECONDARY EVIDENCE, ADMISSIBILITY OF: *Dunn v. State*, 35 Am. Dec. 54; *Pruden v. Alden*, 34 Id. 51; *Eakin v. Vance*, 48 Id. 770; *Jones v. Robinson*, 54 Id. 212; *Juman v. Toulmin*, 44 Id. 448; *Koch v. Melhorn*, 64 Id. 686; *Tiedale v. Tiedale*, Id. 775; *Harvey v. Thorpe*, 65 Id. 344; *Adair v. Adair*, 71 Id. 779.

ROBERTS v. THORN.

[25 TEXAS, 728.]

JOINT TENANTS AND COPARCENERS STAND IN CONFIDENTIAL RELATIONS IN REGARD TO ONE ANOTHER'S INTEREST, and are not permitted in equity to acquire an interest in the property hostile to that of the other; therefore, a purchase by one of an incumbrance on the joint estate, or an outstanding title to it, is held at the election of his co-tenants, within a reasonable time, to inure to the equal benefits of all the tenants, upon a condition that they will contribute their respective ratios of the consideration actually paid.

RULE THAT ONE OF TWO TENANTS IN COMMON, WHO ACQUIRES SUPERIOR OUTSTANDING TITLE, must hold it in trust for the other, upon that other paying his proportion of the purchase-money, only applies where the interest accrues under the same instrument, or act of the parties or of the law, or where they have entered into some engagement or understanding with one another.

APPEAL from Nacogdoches. Suit by appellants, executors of the will of Elisha Roberts, deceased, against the adminis-

trator and heirs of Frost Thorn, deceased, appellees. Suit was brought by appellants to have decreed to them from appellees an undivided interest in a tract of land, upon the ground that their testator and appellee's intestate had been tenants in common of a void title, under which the land had been once claimed some time previous to Thorn's location and patent. The decree was prayed by appellants on payment by them of their proportionate rate of cost and expense incurred by Thorn to obtain his patent, the amount thereof to be ascertained on the trial of the cause. Defendants filed a general exception to plaintiffs' petition, which the court sustained, and judgment was rendered against plaintiffs, who assigned for error the court's ruling. Other facts appear in the opinion.

H. C. Wallace, for the appellants.

G. F. Moore, for the appellees.

By Court, WHEELER, C. J. The question to be determined is whether, upon the case stated in the petition, the appropriation of the land in question by Thorn as vacant land inured to the benefit of the plaintiffs' testator? In *Van Horne v. Fonda*, 5 Johns. Ch. 388, Chancellor Kent decided that one of two devisees could not purchase an incumbrance on their joint estate and use it to sell the land, and to strip the other of his property. The chancellor said: "I will not say that one tenant in common may not, in any case, purchase in an outstanding title for his exclusive benefit. But when two devisees are in possession under an imperfect title derived from their common ancestor, there would seem naturally and equitably to arise an obligation between them, resulting from their joint claim and community of interests, that one of them should not affect the claim to the prejudice of the other. It is like an expense laid out upon a common subject by one of the owners, in which case all are entitled to the common benefit on bearing a due proportion of the expense. It is not consistent with good faith, nor with the duty which the connection of the parties, as claimants of a common subject, created, that one of them should be able, without the consent of the other, to buy in an outstanding title and appropriate the whole subject to himself, and thus undermine and oust his companion. It would be repugnant to a sense of refined and accurate justice. It would be immoral, because it would be against the reciprocal obligation to do nothing to the prejudice

of each other's equal claim, which the relationship of the parties, as joint devisees, created:" Id. 407.

In accordance with these views, it seems to be well settled that joint tenants and coparceners stand in such confidential relations in regard to one another's interest, that one of them is not permitted in equity to acquire an interest in the property hostile to that of the other; and therefore a purchase, by a joint tenant or coparcener, of an incumbrance on the joint estate, or an outstanding title to it, is held, at the election of his co-tenants within a reasonable time, to inure to the equal benefit of all the tenants upon condition that they will contribute their respective ratios of the consideration actually given. The same equity has been considered as subsisting between tenants in common, where they hold under the same instrument. And where two tenants in common, who had heard of an adverse title and agreed to join in defending against it, or in purchasing it, it was decided that one of them who purchased the adverse title for a small sum must hold it in trust for the other, upon that other paying his proportion of the purchase-money: Cited in *Smiley v. Dixon*, 1 Penr. & W. 441.

But it is said in the notes to the leading case of *Keech v. Sandford*, 1 Lead. Cas. Eq. 74, 75, upon a review of the authorities, that "tenants in common probably are subject to this mutual obligation only where their interest accrues under the same instrument, or act of the parties, or of the law, or where they have entered into some engagement or understanding with one another; for persons acquiring unconnected interests in the same subject, by distinct purchases, though it may be under the same title, are probably not bound to any greater protection of one another's interests than would be required among strangers:" *Matthews v. Bliss*, 22 Pick. 48. This is believed to be a proper qualification of the doctrine as applied to tenants in common, and applied to the present case it cannot, we think, be held that the title acquired by Thorn inured to the benefit of plaintiffs' testator. Their interests did not accrue under the same instrument, but they purchased at different times, by different instruments; and there is no averment of any agreement between them respecting the title. It is averred that the defendants' testator had brought suit to recover the possession, and gave notice to the plaintiffs' testator of the pendency of the suit, and requested him to furnish counsel to assist in the prosecution of it, which he did. This can scarcely

be said to be a sufficient allegation of an agreement between the parties to unite in defending and upholding the title. It is the statement of evidence tending to the proof of such an agreement rather than of the agreement itself. It is to be observed that it is not averred that Thorn was ever in possession, or that he had any superior knowledge or means of information respecting the state of the title, or that he made use of his co-tenancy to obtain an advantage. The only complaint is, that he located the land and obtained the title from the government without giving notice to his co-tenant. But so far as appears, his co-tenant had equal knowledge and opportunity to secure the land for himself if he saw proper. It appears by the petition that others, as well as Thorn, were aware of the condition of the title, and had already located a considerable portion of the land.

This brings me to notice another aspect of the case, which, to my own mind, is decisive. It is not averred that the supposed title purchased of Sterne was of any value; and I think it may be inferred from the petition that it was worthless, and the land in fact vacant. If such was the case, the parties acquired nothing by their purchase, and consequently had no title or estate to create a tenancy in common. The doctrine we are considering applies where there is a community of interest in a defective title, or a superior outstanding title or incumbrance. If the inference I deduce from the statements of the petition be correct, this is not the case of a defective title, but of a want of title. In such a case in Pennsylvania, where two persons had purchased from a third, who was supposed to have a title, but who, it was afterwards ascertained, had none, the supreme court held that there was nothing in the supposed co-tenancy to prevent one of the parties from appropriating the land for his own exclusive benefit: *Smiley v. Dixon*, 1 Penr. & W. 441. The parties took nothing by their purchase; they were not joint tenants, or tenants in common, and there was no privity between them. The court recognized the doctrine which forbids one tenant to do anything to the prejudice of his co-tenant, in its full extent, but denied its application to such a case; observing that there was no privity, no confidence, between the parties, and nothing done by the one to induce the other to purchase or to confide in their purchase. The land was vacant, to be taken by the first occupant; and there existed no obligation between the parties to prevent its appropriation by one of them. These observations

apply in their full force to the present case, in my view of it. There was no privity between the parties, they acquired nothing by their purchase, and there was no relation of confidence or community of interest to prevent the appropriation of the land by one of them. I mention this view of the case only as the one which is most satisfactory to my mind.

We are of opinion that there is no error in the judgment, and that it be affirmed.

Judgment affirmed.

CO-TENANT IN POSSESSION ACQUIRING ADVERSE TITLE cannot assert it against his co-tenants, if they are willing to contribute ratably to the cost of his purchase: *Sneed v. Atherton*, 32 Am. Dec. 70; and see *Weaver v. Wible*, 64 Id. 696; *Tisdale v. Tisdale*, Id. 775; *Lloyd v. Lynch*, 70 Id. 137, and note 141; *Brittin v. Handy*, 73 Id. 497.

THE PRINCIPAL CASE IS CITED in *Rippetoe v. Dwyer*, 49 Tex. 505, to the point that tenants in common acquiring their interests under different instruments, at different times, and there being no agreement between them respecting the title, are under no such relation to each other as to prevent one of them from purchasing an outstanding title or incumbrance.

STROUD v. CASEY.

[25 TEXAS, 740.]

STRANGER PURCHASING BONA FIDE AT SALE UNDER EXECUTION OF LANDS OR GOODS takes a title unaffected by the subsequent reversal of the judgment.

PLAINTIFF IN EXECUTION, AND ATTORNEY WHO RECOVERED JUDGMENT, ARE DEEMED TO BE PURCHASERS WITH NOTICE of all errors and irregularities in the proceedings and judgment in the suit; and where plaintiff bought land at sheriff's sale on execution, under judgment in his favor, and conveyed it to the attorneys who obtained the judgment, and the judgment was afterwards reversed by the supreme court for error therein, such reversal was held to put an end to the title so acquired.

APPEAL from Rusk. Trespass to try title to a certain tract of land. The head-note and opinion sufficiently show the case.

W. Stedman, for appellant Stroud.

Martin Casey, for the appellees.

By Court, WHEELER, C. J. It is perfectly well settled, that where there has been a sale under execution of lands or goods, and a stranger is the purchaser *bona fide*, his title will not be

affected by the subsequent reversal of the judgment. It is equally well settled that if the plaintiff in execution or his attorney is the purchaser, the reversal of the judgment puts an end to his title. "A man recovers land in a real action, and takes possession under an execution; or he acquires title to land by extent, or to goods by sale under execution, and the judgment is afterwards reversed. So far as he is concerned, his title is at an end, and the thing shall be restored in specie, not merely the value for which it was extended or purchased, but the thing itself. The only exception is where the sale is to a stranger *bona fide*, or where a third person has *bona fide* acquired some collateral rights from the party, before the reversal:" *Per* Cowen, J., in *Dater v. Troy T. P. & R. R. Co.*, 2 Hill (N. Y.), 633; Bac. Abr., tit. Execution, M, 3. The plaintiff in execution, and his attorney who recovered the judgment, are deemed to be purchasers with notice of all errors and irregularities in the proceedings and judgment in the suit. That an attorney for the plaintiff in a suit, purchasing under execution in it, is a purchaser with notice of all irregularities in that suit, was decided in the case of *Simonds v. Catlin*, 2 Cai. 61, in an opinion by Kent, J.; and numerous cases to the same effect might be cited. But the doctrine is too well settled, both as to the purchase by the plaintiff in execution and his attorney who obtained the judgment, to require a further reference to authorities. The cases cited by counsel for the appellees do not controvert this doctrine.

In the present case, the plaintiff in execution, who is the plaintiff in this suit, was the purchaser of the property at the sheriff's sale; and the intervenors, who purchased from him, are his attorneys who obtained the judgment. Under these circumstances, they cannot occupy the attitude of strangers to the erroneous judgment, but are to be deemed purchasers with notice of the errors in the proceedings in that suit. The consequence is, that the reversal of the judgment puts an end to their title. The failure of title in the plaintiffs and intervenors will require a reversal of the judgment rendered in their favor, and the reversal of the judgment as to these parties will require the reversal of the judgment recovered by the defendant Aiken against his co-defendant Stroud, as the latter judgment is dependent upon the former.

The judgment is reversed, and cause remanded.

Reversed and remanded.

TITLE OF PURCHASER AT SALE UNDER EXECUTION ISSUED ON ERRONEOUS JUDGMENT: See *Ponder v. Moseley*, 48 Am. Dec. 194; *Clark's Heirs v. Farros*, 52 Id. 552.

REVERSAL OF JUDGMENT ON WHICH EXECUTION HAS ISSUED ENTITLES JUDGMENT DEBTOR TO RECOVER, by means of a writ of entry against the levying creditor or his grantee, real estate levied on, with rents and profits thereof: *Delano v. Wilde*, 71 Am. Dec. 687.

THE PRINCIPAL CASE IS CITED IN *Petcolas v. Carpenter*, 53 Tex. 29, and in *Harle v. Langdon*, 60 Id. 562, in support of the rule that although a stranger, purchasing *bona fide* at an execution sale, takes a title unaffected by the subsequent reversal of the judgment, yet if the plaintiff in execution, or his attorney, is the purchaser, it puts an end to his title.

PRICE v. McIVER.

[25 TEXAS, 702.]

ESTATE OF DECEDENT MAY BE HELD RESPONSIBLE, ON PRINCIPLES OF EQUITY, to third persons with whom the administrator has created debts properly chargeable against the estate; but to hold the estate so responsible, such third person has the burden to prove that it was a reasonable expense incurred for the benefit of the estate, in the same manner as would be required of the administrator, had he incurred the expense and presented his claim for allowance by the chief justice.

EXECUTOR OR ADMINISTRATOR HAS AUTHORITY TO JUDGE, IN FIRST INSTANCE, of propriety of incurring expense on account of estate; and if he disallow the claim, it necessarily involves litigation between him and the claimant, and the probate court is not the appropriate forum for conducting such litigation.

GIVING OF NOTE BY EXECUTOR OR ADMINISTRATOR PAYABLE TO THIRD PERSON, in consideration of services to be rendered estate, does not bind the estate, nor preclude any defense the executor or administrator may have had to the note when presented for payment. The giving of the note is not the allowance of the plaintiff's claim.

CLAIM CONTESTED BY EXECUTOR OR ADMINISTRATOR MUST BE ESTABLISHED BY SUIT, if at all, and the probate court cannot properly take cognizance of the case.

APPEAL from San Augustine. Suit to establish claim against the estate of one Price, deceased, on a note payable to plaintiff for one hundred and ten dollars, signed by "B. F. Price, executor." Note was given to plaintiff for services rendered by him as overseer in managing a plantation belonging to the estate since the death of the testator. Suit was brought in the county court, and plaintiff's petition averred simply the indebtedness of the executors on account of the aforesaid cause of action, and prayed the court to order the defendant to pay the amount of the note, with interest. Defendants pleaded to the jurisdiction of the county court, and demurred

to the petition, and for special causes of exception assigned the following: That the claim sued on did not appear, from plaintiff's allegations, to have been authenticated as required by law, nor presented to the executors of the estate of Price, deceased, and therefore not by them rejected. Also that the estate of Price, deceased, was not bound by the instrument declared on by plaintiff. The court overruled the plea and demurrer, and rendered judgment for the plaintiff. Defendant appealed to the district court, where the same decision was made upon said questions as in the county court, and judgment rendered for plaintiff against defendants as executors of Price, deceased, for the amount of the note, with interest, to be paid out of the estate in due course of administration.

F. B. Sexton, for the appellant.

Moore and Walker, for the appellee.

By Court, WHEELER, C. J. The provisions of the statute respecting the allowance of claims by the executor or administrator apply in terms only to such claims as existed against the testator or intestate: O. & W. Dig., arts. 755, 757. Provision is made for the allowance to the executor or administrator by the chief justice, of all reasonable expenses incurred in the preservation, safe-keeping, and management of the estate: Id. 820. This provision comprises the only debts which the executor or administrator can create against the estate. And it contemplates that he will have incurred the expense by the payment of money, or by becoming personally responsible to third persons. On general principles of equity, it has been held that the estate may be held responsible to third persons with whom the administrator has created debts properly chargeable against the estate. But to enable a third person to hold the estate so responsible, he must take upon himself the burden of proving that it was a reasonable expense incurred for the benefit of the estate, in the same manner as the administrator must have done had he incurred the expense and presented his claim for allowance by the chief justice: *Caldwell v. Young*, 21 Tex. 800. When the claimant thus comes in place of the administrator, he must have his claim allowed by the latter; otherwise, payment cannot be enforced in the probate court. The law has conferred on the executor or administrator the authority to judge, in the first instance, of the propriety of incurring expense on account of the estate. If he

disallow the claim, it necessarily involves litigation between him and the claimant, and the probate court is not the appropriate forum for conducting such litigation. The manifest intention and policy of the law, deducible from its several provisions, is opposed to the institution of suits in the probate court, by third persons, for the establishment of claims against the estate. That court has no authority to order the payment of claims by the executor or administrator, which have not been allowed by him, or established by suit to which he was a party: *Id.* 786. We therefore think that although the provisions respecting the allowance of claims do not, in terms, apply to such as have accrued after the death of the testator or intestate, yet, if the holder elects to hold the estate liable, instead of the executor or administrator personally, he should bring his case within the provision for the establishment of claims against the estate. That he may do so, we have heretofore considered: *Portis v. Cole*, 11 Tex. 159; *Caldwell v. Young*, 21 *Id.* 800.

If allowance of the claim by the executor is relied on, it ought to be such as will preclude him from litigating the justice of the claim in the probate court; unless on such grounds as would authorize him to repudiate his allowance of the claim as fraud or mistake. There was no such allowance of the plaintiff's claim. The giving of the note by the executor did not bind the estate: *Caldwell v. Young*, 21 Tex. 820. Nor was it such an act as would preclude the executor from setting up any defense he may have had to the note when presented for payment. We therefore think the claim was not authenticated or established in such a manner as to authorize the plaintiff to proceed in the probate court to enforce its payment by the executor. Being contested by the executors, it necessarily involved litigation between them and the claimant, and converted it into a suit for the establishment of the claim against the estate in the probate court, contrary to the manifest intention and policy of the law.

We are of opinion, therefore, that the probate court improperly took cognizance of the case, in the shape in which the claim was presented; and that the district court erred in its judgment maintaining the jurisdiction of the probate court. The judgment must therefore be reversed, and the cause dismissed.

Reversed and dismissed.

PRESENTATION OF CLAIM AGAINST ESTATE OF DECEDENT: See *Henderson v. Riley*, 49 Am. Dec. 41; *Judy v. Kelley*, 50 Id. 455; *Dean v. Dugfield*, 58 Id. 108; *Pollard v. Seear*, 65 Id. 384; *Aguirre v. Packard*, 73 Id. 645.

ORPHANS' COURT HAS ONLY PRIMA FACIE JURISDICTION as to claims against a decedent's estate, and its decisions thereon are not conclusive at law: *State v. Reigart*, 39 Am. Dec. 628.

PROBATE COURT MUST DETERMINE WHETHER THERE ARE DEBTS AGAINST ESTATE OF DECEDENT, OR NOT: *Davenport v. Young*, 63 Am. Dec. 320; and see *Carriker v. Whittington*, 72 Id. 212.

CONTRACTS MADE WITH EXECUTOR OR ADMINISTRATOR ARE PERSONAL, and do not bind estate of decedent: *Fitzhugh v. Fitzhugh*, 62 Am. Dec. 653.

THE PRINCIPAL CASE IS CITED to the point that an administrator can create a debt binding the estate he represents only in cases expressly provided for by statute, in *McMahon v. Harbert*, 35 Tex. 459. It is cited to the point that in relation to debts incurred by the administrator against an estate, the law contemplates that he will have incurred the expense, by the payment of the money, or by becoming personally responsible to a third person, in *Andrus v. Pettus*, 36 Id. 111; and is cited in *Adrianse v. Cresco*, 45 Id. 182, to the point that, on general principles of equity, the estate may be held responsible to third persons with whom the administrator has created debts properly chargeable against the estate.

MITCHELL v. DE WITT.

[25 TEXAS, SUPPLEMENT, 180.]

SURETY PAYING DEBT OF PRINCIPAL IS ENTITLED IN EQUITY to be subrogated to all the creditor's rights in securities for the debt placed in the latter's hands by the principal.

IF, AFTER JUDGMENT AGAINST PRINCIPAL AND SURETY, a third person gives his note for the debt to obtain a stay of execution for the principal, and the surety is afterwards obliged to pay the debt, he is entitled to have an assignment of the judgment on the note of the third person, to indemnify him for such payment. So held, where the original principal in a debt prosecuted a writ of error, and the original surety or indorser of the note afterwards paid the debt, and asked to have the judgment against the original defendants and sureties on the *supersedeas* bond assigned to him.

ACTION by Mitchell against C. E. De Witt and Bateman, the petition stating that De Witt and Harper, as principal and surety, had executed their note to one McKean; that McKean being dissatisfied with Harper's name, plaintiff signed a new note for the debt in his stead, as surety; that the assignees of the note, in a suit thereon, recovered judgment against himself and C. E. De Witt; that C. E. De Witt alone prosecuted a writ of error, on which Columbus C. De Witt and J. T. Bateman became sureties on the *supersedeas* bond; that the judgment was affirmed, whereupon execution was levied upon and made out of plaintiff's property, wherefore the plaintiff claimed the

sum so made from Columbus C. De Witt and J. T. Bateman, and demanded to have the judgment assigned to him, so as to enable him to collect such sum out of said De Witt and Bateman, as sureties on the *supersedeas* bond, C. E. De Witt having become insolvent. Defendant demurred, and the court overruled the demurrer, so that the precise point was, whether the security on the original debt, who did not appeal, is entitled to recover against the sureties on the *supersedeas* bond of his principal, against whom judgment had been rendered in the supreme court, and to have the judgment of affirmance in the supreme court assigned to him.

Mills, for the plaintiff in error.

Stewart, for the defendant in error.

By Court, WHEELER, C. J. It is a just and salutary principle, which has been acted on by courts of equity, that a surety who pays the debt due by his principal to his creditor shall have the benefit of the securities for the debt placed in the power of the creditor by the principal. This equitable doctrine was fully recognized by this court in the case of *Sublett v. McKinney*, 19 Tex. 438. "It seems right," it was said by the supreme court of Pennsylvania in *Pott v. Nathans*, 1 Watts & S. 155, 157 [37 Am. Dec. 456], "that the creditor should transfer the means of indemnification, for which he has no longer occasion, to him who, under a legal obligation to pay in default of the principal debtor, has released these securities from the demand of the creditor, and paid the debt for which they were furnished. Where, however, such means consist of the responsibility of an individual becoming a later surety or guaranty for the same debt of the principal, there arises a conflict of equities, which may give rise to new questions as to the priority between the former and latter surety; such latter surety stipulating, at the instance of the principal, to pay the debt, suffers no absolute injustice in being obliged to do so, since he is compelled to perform no more than he undertook, and has no right to complain that he is not allowed to use, as a payment by himself, the money which proceeds from another person, whom his principal was previously bound to save harmless. How the equity would be in a naked case of this kind, I give no opinion; it is sufficient that it is settled that if the interposition of the second surety may have been the means of involving the first in the ultimate liability to pay, the equity of the first surety decidedly preponderates." Applying this prin-

ciple to the case, then, before the court, where, after judgments were obtained against a principal and surety, a third person interposed and gave his note for the debt to obtain a stay of execution for the principal, and the surety was afterwards obliged to pay the debt, it was held that he was entitled to have an assignment of the judgment on the note of the third person to indemnify him for such payment.

The same principle was acted on by that court in the case of *Burns v. Huntingdon Bank*, 1 Penr. & W. 395. A judgment was obtained against the maker of a promissory note, who afterwards entered absolute security under an act of the legislature in order to obtain a stay of execution. After the expiration of the time stipulated in the stay of execution, judgment was obtained against the surety; and it was held that one of two indorsers who paid the note (who in point of law was but a surety) was entitled to an assignment of the judgment against the surety.

The principle appears to have been first applied to such a case in England, in *Parsons v. Briddock*, 2 Vern. 608, which was approved by Sir William Grant, master of the rolls, in *Wright v. Morley*, 11 Ves. 22. There, where the principal in a bond had been sued and gave bail, and judgment was obtained against the principal and also against the bail by the creditor, and afterwards the sureties on the original bonds were compelled to pay, and then brought their bill in equity to have the benefit of the judgment of the creditor against the bail by having it assigned to them, it was held that they were entitled to an assignment of the judgment against the bail, and it was decreed accordingly. "So that," says Sir William Grant, "though the bail were themselves but sureties, as between them and the principal debtor, yet, coming in the room of the principal debtor as to the creditor, it was held that they likewise came in the room of the principal debtor as to the surety. Consequently, that decision established that the surety had precisely the same right that the creditor had, and was to stand in his place." *Id.* The authority of this decision is supposed to have been shaken in England by some of the more recent decisions; but it appears to have maintained its authority in this country; and Judge Story, while he supposes it to have been much shaken in point of authority, appears to approve of its equity and justice: 1 Story's Eq. Jur., secs. 499 a et seq. It was approved by Chief Justice Gibson, and adopted and acted on by the supreme court of Pennsylvania in *Burns*

v. *Huntingdon Bank*, 1 Penr. & W. 395; was approved by President Tucker in *Langford v. Perrin*, 5 Leigh, 557; and appears to have been received with approbation and recognized as sound in principle generally by the American courts: *Lathrop and Dale's Appeal*, 1 Pa. St. 512; *Powell v. White*, 11 Leigh, 309; *Langford v. Perrin*, 5 Id. 557; *Cuyler v. Ensworth*, 6 Paige, 32; *Speiglemyer v. Crawford*, Id. 254; *Cheesebrough v. Millard*, 1 Johns. Ch. 413; [7 Am. Dec. 494]; 1 Story's Eq. Jur., 7th ed., sec. 499 b, note 2. It was fully adopted and acted on by this court in the case of *Sublett v. McKinney*, 19 Tex. 438, and must be held to be decisive of the present case.

The case of *Parsons v. Briddock*, 2 Vern. 608, and the other cases cited from the Pennsylvania reports, are in point, and fully maintain the right of the plaintiff in this case to indemnity from the defendants, on the principle of the right of the surety, who steps into the place of the principal and pays his debt, to come in the place of the creditor in turn, and be subrogated to all the means of indemnity in the hands or under the control of the creditor. And the doctrine seems reasonable and just in its application to the present case. For, as was suggested in *Pott v. Nathans*, 1 Watts & S. 155 [37 Am. Dec. 456], the later sureties upon the writ-of-error bond suffer no absolute injustice in being obliged to comply with their undertaking, and cannot complain that they are not allowed to use as a payment by themselves the money which has proceeded from the original surety, whom their principal was previously bound to save harmless. But for their interposition, the plaintiff may have been exonerated from his liability. The principal may then have had visible property subject to execution, of which, but for the interposition of the defendants to supersede the judgment and prevent execution thereof, the plaintiff might have availed himself to have satisfaction of the judgment. And "it is sufficient that it is settled, that if the interposition of the second surety may have been the means of involving the first in ultimate liability to pay, the equity of the first surety decidedly preponderates:" *Pott v. Nathans*, 1 Watts & S. 157 [37 Am. Dec. 456]. That is the present case. We are therefore of opinion that the court erred in sustaining the demurrer to the petition; for which the judgment must be reversed, and the case remanded.

SURETY PAYING DEBT IS ENTITLED TO BE SUBROGATED to all the creditor's rights, securities, and remedies to obtain reimbursement: See *Pott v. Nathans*, 37 Am. Dec. 456, and note 458; *Edgerly v. Emerson*, 55 Id. 207, and

note. A surety paying the debt is entitled to be subrogated to the creditor's right to enforce a judgment previously recovered, on a note given by a third person, after judgment against the principal and surety, as collateral security to obtain a stay of execution against the principal: *Pott v. Nathans*, 37 Id. 456, a case almost identical with the principal case.

THE PRINCIPAL CASE IS MISQUOTED in *Unger v. Armstrong*, 37 Tex. 550.

KLEIN v. GEHRUNG.

[25 TEXAS, SUPPLEMENT, 283.]

DOCTRINE OF ANCIENT LEGITS IS NOT FAVORED in TEXAS.

ENGLISH DOCTRINE OF PRESCRIPTIVE RIGHT TO PREVENT OBSTRUCTIONS TO WINDOW LIGHTS is not part of the law of TEXAS, and there can there be no adverse user of lights.

TO CONSTITUTE ADVERSE ENJOYMENT OF INCORPOREAL HEREDITAMENT, the act of enjoyment must be of such a character as to afford ground for an action by the other party; it must be either an invasion of his vested rights or else consequently injurious to their free exercise.

FOUNDATION OF PRESCRIPTIVE TITLE IS PRESUMED GRANT of the party whose rights are adversely affected; but where it appears that the enjoyment has existed by the consent or license of such party, no presumption of grant can be made.

PRESCRIPTIVE RIGHT TO PREVENT ADJACENT PROPRIETOR FROM INCLOSING OR BUILDING upon his own land is not acquired by the use of an adjoining house having windows looking out upon his land, and receiving light and air from that direction for a period of ten years.

ACTION by Gehrung against Klein to compel the latter to remove his fence built on his land in the city of New Braunfels, because it obstructed her windows, and for damages for the obstruction. Gehrung's house, built in 1845 or 1846, had windows overlooking Klein's lot, which afforded the uninterrupted use of light and air, until Klein erected his fence, in 1857; the fence being ten feet high and near the windows, and having the effect to obstruct Gehrung's light. The judge on the trial charged in effect that ten years' unobstructed use of the windows gave the prescriptive right to look out upon the neighbor's land; and that for an adjoining proprietor to obstruct the light, by building on his own land, was a trespass; that is, if he had acquiesced in such user for ten years. Verdict against Klein, from which he appealed.

Jacob Waelder, for the appellant.

Campbell and Smith, for the appellee.

By Court, WHEELER, C. J. "The doctrine of ancient lights is not much relished in this country, owing to the rapid changes and improvements in our cities and villages." In the case of *Parker v. Foote*, 19 Wend. 309, the supreme court of New York held that "the modern English doctrine of a prescriptive right to prevent obstructions to window lights, adopted in analogy to the statute of limitations, is an anomaly in the law, and not adapted to the circumstances or existing state of things in this country;" and they refused to recognize it as the common law. Mr. Justice Bronson examined the subject in an elaborate opinion, and stated the argument upon which the court arrived at its conclusion with great clearness and force. "Most of the cases on the subject we have been considering," he said, "relate to ways, commons, markets, watercourses, and the like, where the use or enjoyment, if not rightful, has been an immediate and continuing injury to the person against whom the presumption is made." His property has either been invaded, or his beneficial interest in it has been rendered less valuable. The injury has been of such a character that he might have immediate redress by action. But in the case of windows overlooking the land of another, the injury, if any, is merely ideal or imaginary. The light and air which they admit are not the subjects of property beyond the moment of actual occupancy; and for overlooking one's privacy, no action can be maintained. The party has no remedy but to build on the adjoining land opposite the offensive windows: *Chandler v. Thompson*, 3 Camp. 80; *Cross v. Lewis*, 2 Barn. & Cress. 686, per Bayley, J. Upon what principle the courts in England have applied the same rule of presumption to two classes of cases so essentially different in character, I have been unable to discover. If one commit a daily trespass on the land of another, under a claim of right to pass over or feed his cattle upon it, or divert the water from his mill, or throw it back on his land or machinery—in these and the like cases, long-continued acquiescence affords strong presumptive evidence of right. But in the case of lights, there is no adverse user, nor indeed, any use whatever of another's property; and no foundation is laid for indulging any presumption against the rightful owner.

The learned judge adverts to the acknowledged principle that a man may build at the extremity of his own land, and that he may lawfully have windows looking out upon the land of his neighbor, and proceeds to say: "The reason why he

may lawfully have such windows must be because he does his neighbor no wrong, and indeed, so it is adjudged, as we have already seen; and yet, somehow or other, by the exercise of a lawful right in his own land for twenty years, he acquires a beneficial interest in the land of his neighbor. The original proprietor is still seised of the fee with the privilege of paying taxes and assessments; but the right to build on the land, without which city and village lots are of little or no value, has been destroyed by a lawful window. Now, what is the acquiescence which concludes the owner? No one has trespassed upon his land or done him a legal injury of any kind. He has submitted to nothing but the exercise of a lawful right on the part of his neighbor. How, then, has he forfeited the beneficial interest in his property? He has neglected to incur the expense of building a wall twenty or fifty feet high, as the case may be, not for his own benefit, but for the sole purpose of annoying his neighbor. That was his only remedy. A wanton act of this kind, although done in one's own land, is calculated to render a man odious. There is, I think, no principle upon which the modern English doctrine on the subject of lights can be supported. It is an anomaly in the law. It may do well enough in England, but it cannot be applied in the growing cities and villages of this country without working the most mischievous consequences:" *Parker v. Foote*, 19 Wend. 316-318. This opinion was approved and the same doctrine reaffirmed by the decision of the supreme court of New York, in 1851, in the case of *Myers v. Gemmel*, 10 Barb. 537.

The supreme court of Maine held the same opinion, upon an examination of the subject on principle and authority, in the case of *Pierre v. Fernald*, 26 Me. 436 [46 Am. Dec. 573]. The court there held this language: "Nothing in law can be more certain than one's right to occupy and use his own land as he pleases, if he does not thereby injure others. He may build upon it, or occupy it as a garden, grass-plot, or passage-way, without any loss or diminution of his rights. No person can acquire any right or interest in it merely on account of the manner in which it has been occupied. When one builds upon his own land, immediately adjoining the land of another person, and puts out windows overlooking that neighbor's land, he does no more than exercise a legal right. This is admitted: *Cross v. Lewis*, 2 Barn. & Cress. 686. By the exercise of a legal right, he can make no encroachment upon the rights of his neighbor, and cannot

thereby impose any servitude, or acquire any easement, by the exercise of such a right for any length of time. He does no injury to his neighbor by the enjoyment of the flow of light and air, and does not, therefore, claim or exercise any right adversely to any rights of his neighbor; nor is there anything of similitude between the exercise of such a right and the exercise of rights claimed adversely. It is admitted that his neighbor cannot obtain redress by any legal process; in other words, that his rights have not been encroached upon, and that he has no cause of complaint. And yet, while thus situated, for more than twenty years he loses his right to the free use of his land, because he did not prevent his neighbor from enjoying that which occasioned him no injury, and afforded him no just cause of complaint. The result of the doctrine is, that the owner of land not covered by buildings, but used for any other purpose, may be deprived of the right to build upon it by the lawful acts of the owner of the adjoining land, performed upon his own land, and continued for twenty years. It may safely be affirmed that the common law contained no such principle. The doctrine, as stated in the more recent decisions, appears to have arisen out of the misapplication in England of the principle by which rights and easements are acquired by the adverse claims and enjoyment of them for twenty years, to a case in which no adverse or injurious claim was either made or enjoyed:" *Pierre v. Fernald*, 28 Me. 440, 441 [46 Am. Dec. 573].

This language is quoted with approval in a note to Greenleaf's treatise on evidence, 2 Greenl. Ev., sec. 539 a, and it is there said by the author: "It seems that to constitute an adverse enjoyment of an incorporeal hereditament, the act of enjoyment must be of such a character as to afford ground for an action by the other party. It must be either a direct invasion of his vested rights, or else consequently injurious to their free exercise. The foundation of prescriptive title is the presumed grant of the party whose rights are adversely affected; but where it appears that the enjoyment has existed by the consent or license of such party, no presumption of grant can be made. Thus in the case of lights, if the building in which they are made is erected on the party's own land, and no building stands on the land of the adjoining proprietor, it has been held that against the latter no right is acquired by the lapse of time."

These authorities, sustained as they most clearly are by

principle, we think sufficient to warrant us in holding that by the common law a prescriptive right to prevent the adjacent proprietor from inclosing or building upon his own land cannot be acquired by the use of an adjoining house having windows looking out upon his land, and receiving light and air from that direction for a period of ten years. If, as has been supposed, a contrary doctrine to that which has been maintained by these authorities would be of mischievous consequences in other states, where in analogy to their statutes of limitations a prescriptive title cannot be acquired until the lapse of twenty years, much more must it have such tendency in this state, where by the same analogy the right to an easement may be acquired by an uninterrupted use and enjoyment for the shorter period of ten years. I apprehend that the principle upon which it has been held such a right may be acquired has never been applied to the case of lights to give a right within the period and under the circumstances upon which it is asserted in the present case. The occupant of a log-house, in a new town which had been founded but little more than ten years when the right was asserted, denies the right of the adjoining proprietor to put a fence around his lot, because it will occasion a partial obstruction of the light and air previously enjoyed by the occupants for that period. The windows, it seems, are so low that a fence of ordinary height cannot be built without obstructing the light, and the witnesses think the house diminished in value twenty-five dollars; and the plaintiff thereupon claims the prescriptive right to have her windows protected as "ancient lights;" and thereby, if need be, wholly to deprive the adjacent proprietor of the use of his lot, at least to deprive him of the right to build or improve upon it in such manner as his interest or fancy may dictate.

It may safely be asserted that the denial of the right of another to the enjoyment and use of his property, upon a user of such a nature, and for such a length of time, has never been sustained by any court. The consequence of the admission of the right claimed by the plaintiff would be that the occupants of low and inferior houses, such as are usually the first erected in new towns, at the end of a few years, would acquire rights without any act of adverse possession, which might render useless and waste the most valuable lots for business purposes or residences in our growing towns and cities. A doctrine fraught with such consequences cannot be the common law of this

country. Formerly, we are told, it was holden that a party could not maintain an action for a nuisance to an ancient light, unless he had gained a right to the window by prescription: *Steed & Courtney's Case*, 1 Leon. 188; *Austen v. Courtney*, 1 Cro. Eliz. 118. But the modern doctrine is, that upon proof of an adverse enjoyment of lights for twenty years or upwards, unexplained, a jury may be directed to presume a right by grant or otherwise: 2 Saund. 175 a. The modern doctrine may very well be applied to the acquisition, upon the presumption of a grant, of those easements of which there is such adverse enjoyment and user, as to lay a foundation for that presumption against the party who had so long suffered an invasion and denial of his rights, without asserting them. But in a case like the present, as has been seen, there is no such adverse enjoyment. No right of the defendant has been encroached upon by the use of the plaintiff's windows; and there can be no foundation for presuming a grant, as in the case of an adverse enjoyment of a right in analogy to the statute of limitations. The plaintiff cannot have acquired a right or interest in the defendant's lot merely on account of the manner in which she has used her own, upon any principle analogous to that upon which the statute proceeds.

Nothing, as has been said, can be more certain than that every one has a right to use his own as he pleases, provided he does not thereby injure others; and it is inconceivable that, upon any principle, one can acquire a right or interest in that which is another's, merely by the manner in which he uses his own. If he could, it would result that one's right to the use and enjoyment of his property would become lost to him by the acts of another which in no way affected him, and against which, consequently, he had no remedy, no means of redress or prevention, unless, as has been said, by building a wall between himself and his neighbor. Such cannot be the doctrine of the common law. And we think it has been sufficiently shown that we have both principle and authority for holding that the present action cannot be maintained.

Every one who builds upon the margin of his lot, in a town or city, does so with a knowledge that the adjoining proprietor has the same right; and if he would not be put to inconvenience in consequence of the exercise by his neighbor of his right, he must have respect to that right in the uses to which he appropriates his own; so that he may enjoy his own, and at the same time suffer his neighbor to enjoy that which is his.

Our opinion upon the right of the plaintiff to maintain the action will dispense with the necessity of our opinion of the question of jurisdiction in the justice.

The judgment is reversed, and the cause dismissed.

DOCTRINE OF ANCIENT LIGHTS, GENERALLY: See *Pierre v. Fernald*, 46 Am. Dec. 573, and note 578-583, where the subject, including the acquisition and obstruction of ancient lights, is extensively discussed. And see *Collier v. Pierce*, 66 Id. 453, and note 455.

DIKES v. MILLER.

[26 TEXAS, SUPPLEMENT, 261.]

UNITED STATES, IN ITS POLITICAL CAPACITY, MAY ENTER INTO CONTRACTS, take bonds, receive real or other property as security for debts, and the like, in cases not previously provided for by law; and no legislative authorization is required therefor, but the power exists as incident to the general right of sovereignty; the government, as a body politic, being authorized, within the sphere of the constitutional powers confided to it, and through the instrumentality of the proper department to which those powers are confided, to enter into contracts not prohibited by law, and appropriate to the just exercise of those powers.

STATE UNDOUBTEDLY HAS CAPACITY TO TAKE BY DEED OR DEVISE, and a release to it by a grantee of land will be operative and effectual to divest the title of the grantee.

COMMISSIONER OF GENERAL LAND-OFFICE IS PROPER OFFICER to accept relinquishments of title by a grantee to the state, as his is the office or department in which to preserve the evidences of the public lands and land titles of the state; and in the absence of any legal provision or prohibition, he must be deemed to have authority to accept the relinquishment of title on behalf of the state.

ORIGINAL DEED OF RELINQUISHMENT TO STATE BY GRANTEE is an archive, and a copy certified as such by the keeper of the records is admissible in evidence.

ORIGINAL DEED, ON FILE IN OFFICE OF COMMISSIONER of public lands, if not an archive, cannot be removed from the office, and where its non-production in evidence is thus accounted for, its execution and contents may be fully proved by a copy certified by the commissioner, such copy being the best evidence of which the nature of the case is susceptible.

TRESPASS to try title. The case turned on the effect of a voluntary relinquishment, by a grantee of land, to the state, and the delivery of the deed to and filing it with the commissioner of the general land-office. The court charged, in effect, that such a deed of relinquishment was valid, and would divest his title out of the party so relinquishing to the state, and a subsequent grantee of his title would take nothing.

The jury rendered a verdict for defendants (the subsequent grantees of the state), and the plaintiff appealed.

William H. Stewart, for the appellant.

I. A. and George W. Paschal, for the appellee.

By Court, WHEELER, C. J. When this cause was before us on a former appeal, we intimated an opinion that the deed of relinquishment of the third of June, 1843, was operative and effectual to divest the title of the grantee, Wickson, and vest it in the government: *Dikes v. Miller*, 24 Tex. 417. We are now referred by counsel for the appellee to a series of cases decided by the courts of the United States, which strengthen this opinion. Thus, it is held that the United States, in their political capacity, may enter into contracts, may take a bond, and may receive real or other property as a security for a debt, in cases not previously provided for by law. This power exists as an incident to the general right of sovereignty; and the government, being a body politic, may, within the sphere of the constitutional powers confided to it, and through the instrumentality of the proper department to which those powers are confided, enter into contracts, not prohibited by law, and appropriate to the just exercise of those powers. It does not require legislation to empower the proper department to act in making the contract or receiving the security; the power exists as an incident to sovereignty, and may be exercised by the proper department, if not forbidden by legislation: *Dugan v. United States*, 3 Wheat. 172; *United States v. Tingey*, 5 Pet. 114; *United States v. Bradley*, 10 Id. 343; *United States v. Linn*, 15 Id. 290; *Neilson v. Lagow*, 12 How. 107; *United States v. Lane*, 3 McLean, 865.

It is undoubted that the state has the capacity to take by deed or devise: *Bell County v. Alexander*, 22 Tex. 350. The commissioner of the general land-office would seem to be the proper officer to accept the relinquishment of title in a case like the present. This is the department or office in which to preserve the evidences of the public lands and land titles of the state. And upon the principle of the decisions to which we have referred, in the absence of any legal provision or prohibition, he must be deemed to have authority to accept the relinquishment of title on behalf of the state. On the authority of these decisions, and upon the considerations heretofore adverted to, *Dikes v. Miller*, 24 Tex. 423, we think it safe to conclude that the deed of release in question was effectual to pass the title and revest it in the state; at least, that it was sufficient to

divest the title of the grantee, which is sufficient for the disposition of this case.

Having parted with his title, the grantee, Wickson, had nothing to convey by his subsequent deed to Arrington. That being but a quit-claim deed, and the conveyance from Arrington to the plaintiff being also by a quit-claim deed, the latter took the risk of the title: *Dikes v. Miller*, 24 Tex. 425, and cases cited. Not having acquired the title, it is plain that he cannot maintain the action; and there is, therefore, no error in the charge of the court.

The proof of the deed of release was objected to on various grounds; but the objections were overruled, and we think rightly. The original was an archive, and the copy certified as such by the keeper of the records was admissible in evidence. But if not an archive, the original could not be removed from the office. Its non-production was accounted for, and its execution and contents fully proved by the production of the best evidence of which the nature of the case was susceptible. The evidence produced was not such as presupposed the existence of better evidence within the power of the party. It was the best and only evidence of which the case was susceptible, and was therefore the "best evidence" within the meaning of the rule upon that subject: 1 Greenl. Ev., sec. 82.

We are of opinion that there is no error in the judgment, and that it be affirmed.

THE PRINCIPAL CASE IS CITED IN *Harrison v. Boring*, 44 Tex. 261, to the point that after a relinquishment or reconveyance of a grantee's interest in property, his quit-claim deed, made subsequently, passes no title or right other than he had at the time of making it; and in *State v. Cardinas*, 47 Id. 288, to the point that generally it is the fact that a paper is a record of an office that makes a properly certified copy stand in place of the original when it is shown to be lost or cannot be produced.

VAN HOOK v. SIMMONS.

[26 TEXAS, SUPPLEMENT, 322.]

GRANTEE OF LAND, BY ALTERING OR DESTROYING HIS TITLE DEED, does not lose his title to the land. The deed, as the instrument of conveyance, passed the title to the grantee, and therein performed its office, and its continuance in existence is not essential to a continuance of title in the grantee; but the estate remains in him until it has passed to another by some mode of conveyance recognized by law.

TRESPASS to try title. The opinion states the facts.

C. M. Winkler, for the appellant.

Mills and Beaton, for the defendant in error.

By Court, WHEELER, C. J. The charge of the court was to the effect that the parol agreement between the defendant and his brother, J. P. Simmons, to destroy the deed of conveyance from the former to the latter, and take back the land, would destroy the effect of that conveyance, or it would divest the estate of the latter, whether the deed was in fact destroyed or not. In this, we incline to think the court erred. "If the grantee of land alter or destroy his title deed, yet (it is said) his title to the land is not gone. It passed to him by the deed; the deed has performed its office as an instrument of conveyance; and its continued existence is not necessary to the continuance of title in the grantee, but the estate remains in him until it has passed to another by some mode of conveyance recognized by law:" 1 Greenl. Ev., secs. 265, 568, and notes.

The deed had been delivered, and the estate vested; it did not appear that the deed had been in fact canceled; and if it had been, it would seem this was not sufficient under the statute of frauds, which requires writing to divest or pass the estate out of the grantee.

It is not necessary, at present, to consider in what cases the cancellation of a deed will have the effect, operating in the nature of a surrender, to divest the estate. The evidence would not warrant the court in giving that effect to what transpired between the parties in the present case.

We are of opinion, therefore, that the judgment must be reversed, and the cause remanded.

DESTRUCTION OF TITLE DEED DOES NOT DIVEST TITLE OF GRANTEE: See *Tibben v. Tibben*, 59 Am. Dec. 329, and note 331; *Thompson v. Thompson*, 68 Id. 639, and note; *Howard v. Huffman*, 75 Id. 783.

ROSS v. ARMSTRONG.

[25 TEXAS, SUPPLEMENT, 354.]

GRANTEE OF HEAD-RIGHT CERTIFICATE PLACING IT IN HANDS OF LOCATOR, under a covenant to locate, survey, and obtain a patent, and then to divide the land between the owner and the grantee, does not thereby make a sale of land, although formal words of conveyance are used and a money consideration paid; but the agreement is one for the future acquisition of land under which the purchaser is to make the selection,

and the parties are to participate equally in the benefits to be derived from the selection when made.

CONTRACT WHEREBY HOLDER OF HEAD-RIGHT CERTIFICATE places it in the hands of a locator under a covenant to locate, survey, and obtain a patent, and then divide the land between the owner and the grantee, where it is really an adventure on shares, and the patent is to issue in the name of one for the benefit of both, is a resulting trust, in which the grantee becomes the trustee for the benefit of his equitable tenant in common.

UNDER JOINT ADVENTURE BETWEEN HOLDER OF HEAD-RIGHT CERTIFICATE AND LOCATOR to secure patent to government land, and to divide the land when acquired, if, after securing the grant and dividing the land, it is discovered that part of the land which the government has thus granted had been previously appropriated by older title, the partition is one upon a mistake of facts from which equity will relieve.

IT IS GENERAL RULE IN EQUITY THAT ACT DONE OR CONTRACT MADE under mistake or ignorance of material fact is voidable and relievable against in equity, when such mistake or ignorance constitutes a material ingredient in the contract, or the motive of the act done by the parties, and disappoints their intention by a mutual error.

DISTINCTION BETWEEN JOINT TENANCY, TENANCY IN COMMON, AND ESTATE IN COPARCENARY, has been abolished in Texas, and the tenants are there treated all alike, simply as "part owners," and are all alike entitled to compulsory partition, and the rights of all are preserved upon any previous warranty of the title under which the tenants hold.

WHERE THERE HAS BEEN PARTITION BETWEEN TENANTS IN COMMON IN TEXAS, and there is failure of title, the remedy is in a court of chancery, either by setting aside the partition when improperly made and it can be done without injustice to others, or by contribution when it is most proper.

BILL in equity. Plaintiff's intestate, Thomas Ross, in his life-time being the holder of a head-right certificate, in consideration of five thousand dollars, entered into an agreement, using formal words of conveyance, whereby he placed the certificate in the hands of one Wheelock, authorizing and empowering him to locate, survey, and obtain a patent to land thereunder, and then to divide the land between them in equal parts. Wheelock assigned to the defendant Armstrong, who went on, made the location, and divided the property. Subsequently, and after the death of Ross, it was discovered that the grant of the government, as to the part of the land which became the property of Ross's widow by her selection as his administratrix, on the division thereof, was in conflict with a superior and older grant of one Latham. Plaintiff then brought this bill, alleging mistake of fact in the partition, and praying that it be set aside and an equitable division made, and for damages. The law and fact being submitted to the court, the bill was dismissed, from which judgment of dismissal plaintiff appealed.

Aycock and Stewart, for the appellant.

Prendergrast and Feeney, for the appellee.

By Court, WHEELER, C. J. The contract of the sixth of April, 1838, was not a contract for the sale of land. It contemplated the future acquisition of land, in which, when acquired, the parties should have an equal joint interest. That interest would be more or less valuable according to the quality and locality of the land which should be selected. The purchaser was intrusted with making the selection, and the parties were to participate equally in the benefits to be derived from it when made. If it proved injudicious, and loss were sustained, it would certainly be a very hard case that the entire loss should fall on the other partner, and the locator should take the whole that remained. That certainly was not what the parties intended.

The money consideration paid did not convert the contract into a sale of land, for no land had been secured. If it had been a contract for the sale of a half-league of land already located, it would have been a different case. The parties would have known about what they were contracting, and the purchaser would have acquired a right to a thing certain, which he would have been entitled to have conveyed to him for the price stipulated, however disadvantageous the contract might prove to the other party. But such is not the case. The purchaser contracted for one half of what he might secure by means of the certificate, be that more or less. That was the intention of the contract. It would certainly be extremely inequitable to allow him, through a mistake of his own, though without fault on his part, to possess himself of the whole. Against the consequences of such a mistake, it would seem that equity ought to relieve. It was an adventure, in which the parties contributed, as they deemed, equally of their means, and were to share equally the profits. It is analogous to the case of a joint purchase, made by two persons, who advance and pay the purchase-money in equal proportions, which, according to the common law, would create a joint tenancy; but by our law, as the right of survivorship is abolished, would be deemed to create a trust, and if the purchase be made, and the title taken in the name of one of them, he becomes a trustee, and the other will be entitled to his share as a resulting trust: 2 Story's Eq. Jur., sec. 1206.

If the parties had contributed equal sums, to be invested in

the purchase of land, and one of them, being intrusted with making the purchase, had taken the title in his own name, or in their joint names, and a loss were sustained by the failure of the title to a part, it cannot be doubted that, on principles of equity, each must bear his proportion of the loss. In such a case, they might have their recourse against their vendor upon the covenants in the deed. But in the present there is no recourse against the government on account of the failure of title, and the purchaser had but an equitable title. It therefore differs from the ordinary case of a partition of land between tenants in common. The division of the land, after it was acquired, by which the locator obtained the whole that was secured by the certificate, was made under an obvious mistake of fact; the consequence of which is, that the grantee of the certificate has lost all the benefit of it, and is remediless, unless the division be set aside, or the defendant be required to make contribution. From the consequences of such a mistake, equity, it would seem, ought to relieve. It is a general rule in equity that an act done, or contract made, under a mistake or ignorance of a material fact, is voidable and relievable against in equity. Thus if A buy an estate of B, to which the latter is supposed to have an unquestionable title, and it turn out upon due investigation of the facts, unknown at the time to both parties, that B has no title, as if there be a nearer heir than B, who was supposed to be dead, but is in fact living—in such a case, equity will relieve the purchaser and rescind the contract: 1 Story's Eq. Jur., sec. 141. So if one person should sell a messuage to another, which was at the time swept away by a flood, or destroyed by an earthquake, without any knowledge of the fact by either party, equity would relieve the purchaser. So if a person should execute a release to another party upon the supposition, founded in a mistake, that a certain debt or annuity had been discharged, although both parties were innocent, the release would be set aside on the ground of mistake: *Id.*, sec. 142. In such case, the act or contract is void, as founded upon a mutual mistake of matter constituting its basis. The mistake or ignorance of fact is the subject of relief when it constitutes a material ingredient in the contract or the motive of the act done by the parties, and disappoints their intention by a mutual error: *Id.*, secs. 142 et seq. Such was the case in the making of the division of the land in question. The plaintiff, by her deed, released to the defendant the title to half the league, under

the mistaken belief that she had an indefeasible title to the residue. The parties were alike ignorant of the existence of the superior title in a third party; the mistake was mutual, and did not arise from any want of care and diligence in the party who seeks to be relieved, and to have the act done in consequence of the ignorance and mistake set aside. But for the mistake, it is clear the deed would not have been executed. It has disappointed the intention of the parties by a mutual error, and has resulted in giving one of them an unconscionable advantage, against which the other had not any means of providing; and it would seem that she is entitled to have the act done by her set aside on the clear ground of mistake.

In the view we have taken, we have not considered the case strictly as that of a partition between tenants in common; but viewing it in that light, what are the rights of the plaintiffs?

In *Bustard's Case*, 4 Co. 121, it was adjudged that, in every exchange of lands, there is implied both a condition of re-entry and a warranty; and if one party is evicted from the land conveyed to him, he may either re-enter upon his own land, or recover upon the warranty; but in the latter case, the recompense should be confined to the land given in exchange; and that the same condition and warranty were implied in the case of a partition. In both of these species of assurance there was not only an implied warranty, but a condition, which, in case of eviction of either party, gave a right of re-entry upon the other portion. There was, however, this difference between the warranty and the condition: where a coparcener took advantage of the condition, she defeated the partition as to the whole; but when she vouched by force of the warranty, the partition was not defeated in the whole, but she recovered recompense for the part that was lost. But this implied warranty and condition were, by the common law, confined to a partition made between coparceners, and for the reason, it is supposed, that the right of compulsory partition was given by the common law only to coparceners, and not to joint tenants, or tenants in common, to whom the right was first given by statute. The common law, having given this right in favor of coparceners, deemed it reasonable and just that they should not be placed in a worse condition by the partition (which could be compelled by writ of partition or a bill in chancery) than if they had continued to enjoy their respective interests without a partition; in which case, if suit

had been commenced upon a paramount title, all must have been impleaded, and in case of recovery, all must have sustained their due proportion of the loss. In order, therefore, that they should not be placed in a worse condition by a compulsory partition, the common law annexed to the partition the implied warranty, as a condition for their protection. But as, by the common law, joint tenants and tenants in common could only make partition by agreement, there was not the same reason, it was thought, why the law should imply a warranty in case of a partition by them; because, in making the partition, it was competent for them, by the terms of their agreement, to provide against future losses by paramount titles. The law implied no warranty or condition, because they were not compellable to make partition, as coparceners were, and might protect themselves by express stipulations or covenants in their deeds of partition.

Such are some of the reasons why, by the common law, a warranty and condition of re-entry were implied in the case of a partition between coparceners, and not in a partition by joint tenants and tenants in common. But the statute of 81 Hen. VIII., c. 1, which gave to joint tenants and tenants in common the right of partition by compulsory process, gave also the warranty: *Rawle on Covenants*, 467.

By our law, the leading distinctive characteristics of those several kinds of estates have been abolished. By the act of the twenty-eighth of January, 1840, the right of survivorship between joint tenants was abolished, and it was provided that coparceners might maintain waste against each other: *Hart. Dig.*, arts. 588, 589. And although the latter provision was omitted in the act of the eighteenth of March, 1848 (*O. & W. Dig.*, arts. 344 et seq.), which was intended as a substitute for the former law and repealed it, I apprehend the legislation upon the subject would not warrant the supposition that it was intended to preserve the common-law distinctions between an estate in coparcenary and other estates in joint ownership. The act of the fifth of February, 1840, "to enable part owners of land to obtain partition thereof," recognizes no distinction between these several kinds of estates in joint ownership, but treats the tenants all alike, simply as "part owners," and gives all alike the right of compulsory partition: *Hart. Dig.*, art. 2617; *O. & W. Dig.*, art. 1510. It also provides against giving the partition the effect of destroying any previous warranty of the title under which the tenants hold (*O. & W. Dig.*, art. 1511),

which, in this respect, also places joint tenants and tenants in common upon the same footing as coparceners occupied at the common law.

The effect of these provisions seems to be to destroy the numerous and important distinctions which existed between these several kinds of estates at the common law, and for all practical purposes to reduce them to one estate, namely, an estate in common, with, however, the rights and remedies that appertained to tenants in coparcenary at the common law. This is in harmony with the comparative simplicity of our law of realty in other respects, and is a great improvement upon the former state of the law. The refined and artificial distinctions which existed at the common law were calculated only to perplex and embarrass, without producing any corresponding benefits. The practical effect of wiping them away, and placing all upon the more favored footing of tenancy in coparcenary, giving to joint tenants and tenants in common the right of compulsory partition, and preserving their rights upon any previous warranty, as if they had been coparceners, would seem to be to confer upon them the rights and remedies of coparceners at common law; the most important of which, in case of partition, were the implied condition and warranty, whereby a coparcener, evicted by a paramount title, could defeat the partition in the whole, or recover recompense for the part that was lost.

We find but few cases where the question has arisen in the courts of this country. The supreme court of Pennsylvania, in the case of *Weiser v. Weiser*, 5 Watts, 279 [30 Am. Dec. 313], where the partition was by deed, which contained a clause of special warranty, held that no warranty was implied, and that the rights of the tenants in common depended solely upon the covenants in the deed. But in the subsequent case of *Patterson v. Lanning*, 10 Id. 135 [36 Am. Dec. 154], the same court held that, in a partition of lands between tenants in common, who derived their estate by descent, there is an implied warranty of title; and this was the case of a partition by deed. In the former case, the decision was probably much influenced by the consideration that the deed of partition contained an express covenant of special warranty, declared on as a general warranty; the court holding that an express covenant qualifies and restrains the generality of an implied covenant. Other considerations were adverted to, which doubtless had their influence upon the decision of the court. And it is to be

observed, moreover, that the statute law of that state does not appear to have so completely effaced the distinctions between estates held in joint ownership as does ours.

The subject underwent an elaborate examination by the supreme court of Tennessee, in the case of *Sawyers v. Cator*, 8 Humph. 256 [47 Am. Dec. 608], where one tenant in common filed a bill for contribution and reimbursement against his co-tenants and their alienees, and the court held that in partition between tenants in common there is an implied warranty between the parties to the partition, by which they have the mutual right, in case of eviction by paramount title, to have compensation from each other for loss sustained, and that the remedy is by bill in equity, either by setting aside the partition as being founded in mistake, if it can be done without injustice; if not, then by a decree of pecuniary contribution. It was said the right of entry did not exist, it was not given by statute, and had never been in use in that state; the implied covenant could not be vouched upon, because that mode of proceeding had never been in use there, and is now obsolete even in England. "We have been able to find," the court said, "no precedent for an action of covenant upon such implied warranty. It then necessarily follows that where there has been a partition between tenants in common, and there is failure of title, such relief must be given by bill in a court of chancery, or it must be altogether denied—a thing that justice and equity will not permit. It seems to us that a court of chancery is peculiarly adapted to give the relief, which is upon the principle of contribution; a subject over which such courts have so long had almost exclusive jurisdiction. We therefore think the remedy in a court of chancery, either by setting aside the partition, when improperly made, and it can be done without injustice to others, or by contribution, when it is most proper." And as contribution was asked, and was deemed more appropriate and just in that case, it was accordingly decreed.

This we deem to be the just and equitable doctrine, which ought to obtain in the administration of justice between joint owners of land in cases of partition in the courts of this state. Since, as we have seen, our statutory law has abolished the common-law distinctions between the joint owners of land, and placed them upon the same footing for all practical purposes, and has rendered them alike liable to make partition at the election of any one or more of their co-tenants, it would seem to follow that this remedy and mode of relief must be admit-

ted to avoid an utter denial of justice. Unless it be admitted, parties situated like the plaintiff in the present case would not only be wholly remediless, but would be unable to provide against loss by any precautionary means whatever. The contract obliged the plaintiff to make title in accordance with its terms; she could require no deed or assurance on the part of the defendant, because she held the title to the whole, and the contract did not authorize her to call on the defendant for such deed or assurance. She therefore had it not in her power to secure herself by any express covenant by the defendant. Every consideration, therefore, which can address itself to a court of equity to grant relief in any case, may be invoked on behalf of the plaintiff in this case. We think she is entitled to the relief which she seeks, to have the proceedings and deed by which the division of the land was effected set aside as founded in mistake, and to have an equitable partition of the land which remains unaffected by the paramount title decreed between herself and the defendant.

The judgment is therefore reversed, and the cause remanded for further proceedings.

Reversed and remanded.

MISTAKE OF FACT, WHEN GROUND FOR RELIEF IN EQUITY: See extensive note to *Miles v. Stevens*, 45 Am. Dec. 631-634; and see *McDaniel v. Bank of Rutland*, 70 Id. 406, and note.

COPARCENARY, JOINT TENANCY, AND TENANCY IN COMMON, distinctions between, and where in existence: See *Gilpin v. Hollingsworth*, 56 Am. Dec. 737; *Patterson v. Lanning*, 36 Id. 154; *Root v. McFerrin*, 75 Id. 49.

THE PRINCIPAL CASE IS CITED in *Bell v. Warden*, 39 Tex. 108, and *Doss v. Slaughter*, 53 Id. 237, both cases in which contracts similar to that in the principal case were under discussion; and it was held that such contracts were not to be regarded as deeds, but as personal contracts giving the locator an equitable right in the land located.

STONE v. DARNELL.

[25 TEXAS, SUPPLEMENT, 430.]

IF PROPERTY OF EXECUTION DEBTOR, SOLD AT SHERIFF'S SALE, is recovered by him from the purchaser on the ground of its exemption from execution as a homestead, the purchaser may recover back his money from the execution debtor.

PURCHASER FROM WHOM PROPERTY BOUGHT AT EXECUTION SALE IS RECOVERED, because it is exempt as a homestead, though he might have pleaded his right in reconvention in the ejectment suit, is not precluded because he failed so to do from recovering the money paid by him.

MEASURE OF DAMAGES IN ACTION AGAINST EXECUTION DEBTOR to recover back money paid at a sheriff's sale for the purchase of certain property, where the execution debtor has recovered the property in another action from the purchaser, because as a homestead it was exempt from execution, is the amount of the purchase-money paid to the use of defendant, and interest.

PLAINTIFF MAY PROPERLY DISMISS AS TO PARTY DEFENDANT after answer, notwithstanding another defendant set up a defense in his answer which was unfavorable to his co-defendant.

EXCEPTIONS TO OVERRULING OF OBJECTIONS TO COMPETENCY OF WITNESSES will not be reviewed, unless the record shows that he testified to some material fact in the case.

ACTION against a sheriff and an execution debtor to recover back money paid as the purchase price of property of said execution debtor at an execution sale by said sheriff, because such execution debtor had, subsequent to the sale, recovered back, in an action of ejectment in Kaufman county, the property sold to plaintiff, on the ground that it was exempt from execution as a homestead. After Darnell, the execution debtor, had answered, setting up a defense unfavorable to the sheriff, and after the answer of the sheriff, the plaintiff dismissed as to the latter. The remaining facts are stated in the opinion.

B. Warren Stone, for the appellant.

George W. Guess, for the appellee.

By Court, **WHEELER, C. J.** When the defendant recovered back the land by the judgment of a court of competent jurisdiction, the right of the plaintiff to have the money he had paid, and which had been applied to the satisfaction of the execution, refunded, was perfect: *Townsend v. Smith*, 20 Tex. 465 [70 Am. Dec. 400].

The plaintiff's right, which he asserts in this suit, was not adjudicated or brought into litigation in the case in the Kaufman district court. Though a party may plead a demand in reconvention, he is not obliged to do so, nor is he precluded of his action by his failure so to plead.

The measure of the plaintiff's damages was the purchase-money he had paid to the use of the defendant, and interest. There was no error in the charge of the court.

There can be no question of the right of the plaintiff to dismiss as to the defendant Haught. It is not perceived that there was any good objection to the competency of Haught as a witness at the call of the plaintiff; but that point need not be decided, since it does not appear that he was examined as

a witness upon the trial, or if examined, that he testified to anything that was material. It only appears that his competency was objected to on the score of interest, and that the court overruled the objection; but whether he was examined and testified does not appear. There manifestly is no error in the judgment, and it is affirmed.

WHERE DEFENDANT RECOVERS BACK LAND SOLD IN EXECUTION, the right of plaintiff to have refunded to him the money he had paid is perfect: *Townsend v. Smith*, 70 Am. Dec. 400 and note.

RIGGS v. HORDE.

[25 TEXAS, SUPPLEMENT, 456.]

ONE WHO ENGAGES TO WORK FOR FIVE MONTHS, and voluntarily breaks the engagement at the end of four months, can, nevertheless, maintain an action on a *quantum meruit* for services.

MEASURE OF DAMAGES IN ACTION BY TEACHER ON QUANTUM MERUIT for her services in teaching for a part of the session during which she was engaged, where the failure to complete the contract is neither the fault of the plaintiff nor of the defendants, is the value of her services for the time during which she taught, not by a *pro rata* division of the time for which she was to teach, but according to the actual value of her services, or the amount of benefit defendants received, not to exceed the contract price.

WHERE, ON APPEAL, NO ERROR IS ASSIGNED, and an error does not go to the foundation of the action, the court may affirm the judgment; but if the plaintiff suggests delay, the court is required to revise the rulings of the lower court.

ACTION by a school-mistress to recover upon a *quantum meruit* for services in teaching for four months, though she had been engaged to teach for a session of five months. She broke her contract for the reason that her attendance on her sick mother rendered her absence necessary. The court instructed the jury that the contract, which fixed the rate of compensation at two hundred and fifty dollars for the session of five months was divisible, and that properly the teacher was entitled to the value of the time that she did teach at the *pro rata* rate, that is, fifty dollars per month. The remaining facts appear in the opinion.

J. L. Halbert, for the appellants.

W. H. Neblitt, for the appellees.

By Court, WHEELER, C. J. We think the court held rightly that the action was maintainable, though the plaintiff had not

fully performed her undertaking according to the terms of the contract. Although there is great diversity of decisions and opinions on the question, we think the better opinion and the course of decisions of this court support the ruling of the court below upon that point. The subject was very ably examined by Chief Justice Parker in the case of *Britton v. Turner*, 6 N. H. 481 [28 Am. Dec. 713], and much of the difficulty caused by the disagreement and want of harmony among the cases was removed by his harmonious opinion: See also Sedgwick on Measure of Damages, 2d ed., sec. 215, note.

But we think the court erred in the instruction to the jury upon the measure of damages. Although the failure to complete performance ought not to be deemed the fault of the plaintiff, neither was it the fault of the defendants; and in that case, the plaintiff can only recover *quantum meruit*. The amount for which the defendants ought to be charged is only the reasonable worth, or the amount of the benefit they received from the services actually rendered, not to exceed the contract price. The contract price, however, does not furnish the rule, but the actual value to the defendants of the services rendered, subject to that limitation. The charge of the court made the contract price the rule for the measure of the damages absolutely, for the jury were instructed that the plaintiff was "entitled to recover *pro rata* pay for services already rendered." The true rule was here departed from, and the jury were required to find for the plaintiff according to the contract price, though the value of the services to the defendants may not have been so much. This is error for which the judgment must be reversed.

There is no assignment of errors; and as the error does not go to the foundation of the action, and is not therefore of a character to require notice without an assignment of error, we might have affirmed the judgment, and put an end to this unfortunate litigation, had not the appellee seen proper to suggest delay. That requires a revision and reversal of the judgment for any error apparent upon the record, though not assigned as error.

The judgment is reversed, and the cause remanded.

RECOVERY ON QUANTUM MERUIT IN CASE OF FAILURE TO COMPLETE CONTRACT for personal services: See *Coe v. Smith*, 58 Am. Dec. 618; *Wolfe v. Howes*, 75 Id. 388, and notes; *Pizler v. Nichols*, 74 Id. 298, and note.

MEASURE OF RECOVERY IN ACTION ON QUANTUM MERUIT: See *Blood v. Enos*, 36 Am. Dec. 363; *Coe v. Smith*, 58 Id. 618; *Hilliard v. Crabtree*, 62 Id. 475, and notes.

CASES
IN THE
SUPREME COURT
OF
VERMONT.

HANFORD v. PAINE.

[32 VERMONT, 442.]

GENERAL VOLUNTARY ASSIGNMENTS FOR BENEFIT OF CREDITORS WILL PASS ALL PERSONAL PROPERTY OF ASSIGNOR, wherever situated, if made according to the laws of the domicile of the assignor, unless their operation is limited or restrained by some local law or policy of the state where the property is situated.

ASSIGNMENTS OF PERSONAL PROPERTY FOR BENEFIT OF CREDITORS ARE CONTROLLED by the Vermont statute of 1852, only when the assignor resides in Vermont, and the assignment is to be carried into effect there by the assignees.

TRUSTEE process. On December 18, 1854, the defendant, Stephen E. Paine, a resident of New York, made in that state an assignment for the benefit of creditors of all his property, which consisted of real and personal estate in New York, and an interest in the stock of goods and other assets of a mercantile partnership, carried on in Vermont by Paine and the trustee, Justus Edson. The assignment was made according to the laws of New York, but did not comply with the Vermont statute of 1852, in that it was not specific nor accompanied by an inventory, the assignees were among the creditors provided for by the assignment, and no copy of the assignment was filed in any county clerk's office in Vermont. On December 20, 1854, the assignees sold Paine's interest in the partnership assets to Edson, who paid part cash, and gave notes for the balance. After the sale and before the notes had matured, the plaintiff, a citizen of New York, and a creditor of Paine, instituted this trustee process against Edson. The trustee was discharged, and the plaintiff excepted.

Asahel Peck and Frederick G. Hill, for the plaintiff.

William G. Shaw, for the trustee.

By Court, REDFIELD, C. J. The general question involved in this case is one of a good deal of practical importance, and one in regard to which there is obviously more or less conflict among the decisions in other states.

There are some points in regard to which we think there is no just ground of controversy. We see no good reason why any different rule should be applied to this case, because of the extent and variety of the property involved. It would be difficult, if not impossible, to define a rule upon this subject, resting upon any such basis. All would agree, we believe, that if the assignor had been a resident of the state at the date of the assignment, and had gone out of the state for the purpose of making the assignment, or being temporarily out of the state, had made the assignment, in either case it must still be governed by the requirements of our law in relation to such contracts. Any other view would operate as a virtual fraud upon the law.

But if the assignor has a *bona fide* residence out of the state, we do not perceive why his contract of assignment may not, with the same propriety, be held to convey his interest in this mercantile partnership as in any single article of personal property within the state, or a chose in action owing from one resident here.

We feel that there can be no question in regard to the right of the legislature to restrict and limit the freedom of alienation of personal chattels, or of choses in action within the state, or to prohibit it altogether, or even to provide for its escheat to the state, after the decease of the present proprietors, unless restricted by constitutional limitations. And by parity of reason, the legislature must have the right to prescribe any formalities in the conveyance of personal property, which they may deem expedient, and to make them universal in their application to all who hold property here, as well those residing without as within the state. There can be no doubt of the power of the legislature in this respect. That was never questioned.

But it has long been the policy of commercial states not to embarrass the free transmission of the title to personal property. And it has been very justly considered as discourteous and illiberal policy in one state to abridge and fetter the opera-

tion of foreign contracts within its limits, or to refuse to enforce them by suits maintained in its courts, or to embarrass foreign owners of personal estate within its limits, in the free enjoyment of its beneficial use, or its ready and unrestricted conveyance. Hence courts have long felt a reluctance to establish any restrictions of this character by means of construction merely. But where such is the fair and reasonable interpretation of a statute, the courts can feel no delicacy and no reluctance in the matter.

1. The great and leading question made in the argument of this case is, whether the statute of 1852, in relation to assignments for the benefit of creditors, was meant to apply to all such contracts intended to operate upon personal property within the state wherever such assignments might be executed. It must be very obvious to any one examining the special provisions of the statute of 1852, that it could only have been intended primarily to apply to cases where the assignor resided within the state, and where the assignment was to be here carried into effect by the assignees. By the third section, it is made the duty both of the assignor and the assignee, to file in the office of the county clerk, "in the county where the assignment is made, and the property assigned is situated, a true copy of the assignment and of the inventory," etc. By the sixth and seventh sections, provision is made for compelling the assignee to give account of his administration of the trust by proceedings before "the chancellor of the circuit." None of the provisions in these sections, which constitute one third of the statute, could have any possible application to an assignment made out of the state. The statute without these provisions would be a very lame and imperfect affair. And the fifth section, which provides for the assignee filing with the "clerk of such county" a "copy of the settlement of his trust account," must also be regarded as having exclusive reference to transactions conducted within the state. It is, therefore, sufficiently obvious that this statute could not have been intended primarily to apply to assignments made, and to be carried into effect without the state. It seems to me as obvious that this statute was not intended to apply to assignments made out of the state, as if the statute had in terms provided that all assignments hereafter made in this state, etc.

But it may still be urged that this statute must be regarded as applicable to all property within the state, personal as well as real. But it seems to us that as no such thing is expressed

in the act, it would be contrary to the general policy of commercial states to adopt such a view by construction merely. The inclination of courts and the general policy of the law is certainly otherwise.

In the law, personalty is generally regarded as having no *situs*. Its title, mode of transfer, and other incidents connected with its use and transmission, are regulated according to the law of the place of the domicile of the owner. This is confessedly true in regard to the requisite formalities in the execution of a will of personalty, although essentially departing from the requirements of the law of the state where such property happens to be situated at the time of the decease of the owner. It is the law of the place of the domicile of the owner which must control these incidents, as to the operation of wills upon personal estate, and also the distribution of intestate estates, according to the general rules of international comity among civilized and commercial states. There can be no doubt of the right of any state to interfere in these matters, even to the extent of prohibiting the operation of foreign wills within its limits. But that is seldom attempted in modern days.

But it is claimed that in regard to the distribution of one's effects (while living) among his creditors, a different rule to some extent has prevailed. This may be true, perhaps. One state is not bound to send property found within its limits abroad to be administered upon, either by assignees, whether voluntary or compulsory, or by personal representatives after death, so long as there are creditors within the state who would thereby be deprived of an equal share with the creditors in the place of the domicile of the debtor. This is the express rule of this state in regard to insolvent estates of deceased persons domiciled abroad. And we see no reason why, upon general principles, we might not expect the same rule to obtain in regard to the effects of living insolvents. But there are no doubt many considerations to be taken into the account in determining such a question. It has been held that, in giving effect to an assignment for the benefit of creditors made out of the state, we act upon considerations of comity merely. This must undoubtedly be received with some qualification. It is certainly not true that we could regard the binding effect of such an assignment, in regard to personal property remaining within the state, as dependent upon the question whether the state where such assignment was made would give effect to an

assignment made in this state as to property in that state. That would certainly be a very narrow and unmanly view of the subject. For this might result merely from a misconception of the law by the courts of that state, and a misapplication of the principles which, according to the generally admitted doctrines of commercial law, ought to have controlled the question. The view proposed would then amount to nothing less than the law of retaliation, the *lex talionis*: Shaw, C. J., *Means v. Hapgood*, 19 Pick. 107.

The only ground which could fairly justify the courts of one state in refusing to recognize such contracts made in other states by persons domiciled there, as matter of comity, must have reference either to a general want of confidence in the mode in which the general principles of commercial law are there administered, which is but another name for the character and standing of such state in regard to civilization and Christianity, or it must have reference to the manner in which we suppose our citizens would be affected by sending them into the forum of that state for the recovery of their claims against the assignor in the particular case.

We think this state, or any Christian state, might, perhaps, fairly be justified in refusing to send its own citizens into Japan or China to obtain payment of a claim against a person domiciled there, and who had there made an assignment of his effects, provided these citizens could obtain payment of such claims, through the attachment and sale of the property of such debtor, remaining in the state where the creditor resided.

And if any of the American states make, by their general laws, such a discrimination in favor of their own citizens in the distribution of the effects of insolvents, either living or dead, as to amount to a virtual denial of justice or of equality of right in such distribution to our citizens, we might fairly claim to apply such property of the insolvent as was found in this state to the payment of such debts as were owing to our citizens. Beyond this, it does not occur to me that, upon principle, we could fairly be justified in making any discrimination in favor of one of our citizens. And neither of these grounds would ordinarily find any basis for their application in regard to assignments made in any of the American states.

The ground upon which courts in one state have refused to give effect to involuntary assignments, made in foreign states under the insolvent and bankrupt laws of such countries, is sufficiently justified upon the ground that such assignments

are affected by the judgment of the courts of such foreign states, which can, of course, have no effect, either upon persons or property, in other states, of which they have no jurisdiction, unless it is effected by transferring such property or persons into the states where such courts exist, and thus giving a sort of *ex post facto* jurisdiction. This is sometimes done by persons abroad coming into the insolvent court and presenting their claims, and accepting a dividend upon them with the general creditors. This makes the discharge a bar to such claims, although the court would have had no jurisdiction over them if they had not been voluntarily presented: *Peck v. Hibbard*, 26 Vt. 698 [62 Am. Dec. 605]. As to the general principle that involuntary assignments under foreign bankrupt and insolvent laws are not binding upon persons or property situated without the states where made, the cases of *Harrison v. Sterry*, 5 Cranch, 289, *Hoyt v. Thompson*, 5 N. Y. 320, *Britton v. Valentine*, 1 Curtis, 168, and 2 Kent's Com. 405-408, and the cases cited by the learned commentator, will be sufficient. The doctrine is most unquestionable, and rests upon grounds entirely aside of those affecting voluntary assignments, that is, upon the want of jurisdiction in the courts making the judgment of compulsory assignment.

In regard to general voluntary assignments for the benefit of creditors, it seems to be an admitted rule that if, according to the laws of the place of the domicile of the assignor, they will have the effect to pass all the personal property of the assignor wherever situated, unless their operation is limited or restrained by some local law or policy of the state where the same is situated: Story's Conf. L., sec. 423 a; Burrill on Assignments, 363 et seq.

In the second edition of Burrill on Assignments, a thorough and exhaustive digest and analysis of the cases upon this subject will be found (pp. 363-372). A careful review of the cases shows very clearly that the preponderance of authority is greatly in favor of the general view above stated. This examination could scarcely fail to bring all fair-minded persons to the same conclusion with this careful and painstaking writer. This author says that in all the cases where a voluntary assignment, valid where made and operative by the laws of the place of the domicile of the owner to transfer personal property everywhere, has not been held to have that effect, as is the fact in some few of the American states, it has been only in favor of the citizens of the states where such decisions have

been made. "As against citizens of other states and especially as against citizens of the state where the assignment was made, the rule appears to hold without qualification, that an assignment, valid by the laws of the state in which it is made, is valid everywhere." This limitation of the exception would narrow its operation so as not to include the plaintiff's claim in the present case, he being not only not a resident of this state, but being a resident of the state of New York, where the assignment was made, and the assignor domiciled at the time, and by the laws of which state it is entirely valid to transfer all the personal property of the assignor wherever situated.

We do not desire, however, to have it understood that we are willing to place our decision upon any such narrow ground. We regard that class of cases which have assumed this ground in regard to the citizens of the other American states, by way of a narrow and specific retaliation, or what is still more ungenerous, for the purpose of giving their own citizens an unequal advantage, as resting upon no enlarged and liberal notions, either of national or general policy. This is the view maintained by Shaw, C. J., in *Means v. Hapgood*, 19 Pick. 105-107. It is there said: "Courts of law are competent to take notice of general considerations of comity; but it is not, we think, within their province to attempt to enforce a precise system of retaliation, by adopting the precise rules against their citizens, which their courts adopt against ours." The very least which could fairly justify our courts in discriminating in favor of our own citizens would be the certainty that the courts of the state where the assignment was made would do so in regard to their own citizens, and thus deprive our citizens of that equal justice which they are entitled to demand and to expect in all civilized and commercial states. One may be compelled to do this as to barbarous and pagan states. We trust Vermont will only do it in the strictest sense, or by way of necessary self-defense.

The principle of the leading case in Massachusetts, *Ingraham v. Geyer*, 13 Mass. 146 [7 Am. Dec. 132], where the rule of discrimination in favor of their own citizens, as to voluntary assignments of insolvents made abroad, is first attempted to be maintained, is virtually condemned by the same court in the case of *Means v. Hapgood*, 19 Pick. 107, when it came under consideration as the decision of a neighboring state. Shaw, C. J., there says that the case of *Fox v. Adams*, 5 Greenl.

245, "has been repeatedly doubted in this state." And this last case was decided expressly upon the authority of *Ingraham v. Geyer*, 13 Mass. 146 [7 Am. Dec. 132], and is in principle the same.

All the other cases in the American states, where voluntary assignments made in other states have been held inoperative against the attachment of personal property by citizens of their own states, have gone upon the narrow and illiberal policy of giving their own citizens an advantage over those of other states. That has sometimes been alluded to by our own courts, by way of argument or illustration, but it has not obtained countenance of late, and certainly ought not to be encouraged, unless in strict self-defense.

The authority in the opposite direction is of far greater amount, besides resting upon grounds which commend themselves both to our sense of justice and consistency with principle: *Caskie v. Webster*, 2 Wall. jun. 131; *Law v. Mills*, 18 Pa. St. 185; *United States v. Bank of United States*, 8 Rob. (La.) 262; *Dundas v. Bowler*, 3 McLean, 397.

The Massachusetts court has, in many instances, and in comparatively recent times, *Zipcey v. Thompson*, 1 Gray, 243, repudiated the notion of giving effect to voluntary assignments by insolvents when they operated against their local legislation, or to defeat attachments made by their own citizens; but they assign no grounds or reasons for such a course which would not equally justify that state in disregarding all foreign contracts which seemed unfavorable to their interest, or not in strict conformity with the special provisions of their local law.

In Connecticut, in *Atwood v. Protection Ins. Co.*, 14 Conn. 555, such assignments are held valid to pass property in that state, although not conforming to the specific requirements of their law, very similar to many of the requirements of our assignment law of 1852. So, also, in New Hampshire: *Sanderson v. Bradford*, 10 N. H. 260.

We have thus disposed of all which could fairly be urged in favor of holding the trustee liable in this state, unless it be the claim that these provisions of our assignment law must be regarded by our courts as something pertaining to the settled policy of the state in regard to the disposition of the effects of insolvents among their creditors, or else that it was meant to attach to all such contracts intended to affect property here situated wherever made.

But we think there is no plausibility in adopting either of

these views. We have said that these provisions of the statute are of a character to indicate very clearly that they were designed to have operation only upon assignments made within the state. And they do not indicate any purpose of being applied to the property conveyed instead of the contract. They are regulations affecting a particular class of contracts, and not the general mode of transferring personal property for the benefit of creditors. There is more plausibility in the argument which attempts to apply them to all assignments of property for the benefit of creditors than in that which would make them a portion of the fixed policy of the state in regard to the disposition of property for the payment of debts of insolvent persons, whenever such property is found in the state; like, for instance, our rule of law requiring a delivery of the property in order to put it beyond the reach of process. The Louisiana cases cited go upon this ground. But we are not prepared to adopt this view even.

In every view which we are able to take of the case, we think the trustee was properly discharged, and consequently the judgment is affirmed.

EXTRATERRITORIAL EFFECT OF ASSIGNMENTS FOR BENEFIT OF CREDITORS.—

The cases upon this question are far from being harmonious. Indeed, this result is almost certain when questions involving conflicting principles of the law are presented to our courts for determination. At the outset, the distinction should be observed between involuntary assignments, under foreign bankrupt and state insolvent laws and voluntary assignments for the benefit of creditors, it being well settled that the former have no legal operation out of the country or state where made: *Burrill on Assignments*, sec. 303; *Saunders v. Williams*, 5 N. H. 213, 214; *United States v. Bank of United States*, 8 Rob. (La.) 262, 414; *Walters v. Whitlock*, 9 Fla. 86, 96; but see the distinction repudiated in *Moore v. Bonnell*, 31 N. J. L. 90. But with regard to a general voluntary assignment, it can be said to be equally well established that if valid by the laws of the state where made and where the assignor resides, it will pass the assignor's personal property wherever situated, as against subsequent attaching creditors or lienors, unless the operation of the assignment is limited or restrained by some local law or policy of the state where the property is found: *Askew v. La Cygne Exchange Bank*, 83 Mo. 366; S. C., 53 Am. Rep. 590; *Johnson v. Sharp*, 31 Ohio St. 611; S. C., 27 Am. Rep. 529; *Jare Paige etc. Co.*, 31 Minn. 136; *Weider v. Madlox*, 6 Tex. Law Rev. 371; S. C., 23 Cent. L. J. 58; *J. M. Atherton Co. v. Ives*, 20 Fed. Rep. 894; *Ockerman v. Cross*, 54 N. Y. 29, affirming 40 Barb. 465; *Walters v. Whitlock*, 9 Fla. 86; *Miller v. Kernaghan*, 56 Ga. 155; *Princeton Mfg. Co. v. White*, 68 Id. 96; *First Nat. Bank v. Hughes*, 10 Mo. App. 7, 22; *Frazier v. Fredericks*, 24 N. J. L. 162; *Noble v. Smith*, 6 R. I. 446, 449; *Houston v. Nowland*, 7 Gill & J. 480; *Wilson v. Carson*, 12 Md. 54; *Baltimore etc. R. R. v. Glenn*, 28 Id. 287, 322; *United States v. Bank of United States*, 8 Rob. (La.) 262; *Cheoming v. Johnson*, 5 La. Ann. 678; S. C., 52 Am. Dec. 610; *Dord v. Bonnaffée*, 6 La.

Ann. 563; S. C., 54 Am. Dec. 573; *Rosenthal v. Martin Bank*, 17 Blatchf. 318, 323; and see *Gregg v. Sloan*, 76 Va. 497; *Harrison's Ex'r v. Farmers' Bank*, 9 W. Va. 424; *Black v. Zacharie*, 3 How. 483, 514; *Green v. Van Buekirk*, 7 Wall. 139, 150; *Harvey v. Rhode Island Locomotive Works*, 93 U. S. 664; Wharton on Conflict of Laws, sec. 353; 22 Cent. L. J. 51, 53, note; 2 South. Law Rev. 240, note.

Hanford v. Paine is cited to this proposition in *Askew v. La Cygne Exchange Bank*, 83 Mo. 370, 371; S. C., 53 Am. Rep. 592, 593; *Johnson v. Sharp*, 31 Ohio St. 619; S. C., 27 Am. Rep. 531; *In re Paige etc. Co.*, 31 Minn. 138; *Weider v. Maddox*, 6 Tex. Law Rev. 373; S. C., 23 Cent. L. J. 60; *Martin v. Potter*, 34 Vt. 38. This rule is applied without regard to the residence of the creditors who attack the validity of the assignment. It makes no difference in the application of the rule therefor, whether the creditors reside in the state where the property is found, in the state where the assignment is made, or elsewhere. The rule itself is based upon the doctrine that a transfer of personal property in accordance with the laws of the domicile of the owner is valid everywhere, but the doctrine is limited, in that the transfer must not be opposed to the local laws or policy of the state where the property actually is; but see *Weider v. Maddox*, 6 Tex. Law Rev. 371; S. C., 23 Cent. L. J. 58; and the comments thereon in *Id.* 51, note. It might be said, then, that it is practically true, as a general proposition, that as regards assignments for the benefit of creditors, personal property has a *situs*, and that such assignments of personal property must be valid by the *lex situs*: compare *Allen v. Bain*, 2 Head, 100; but this statement must be taken with some qualification. Mr. Wharton, in his work on the conflict of laws, section 353, thus gives the rule: "We may, in fine, hold it to be the settled law of our courts, both federal and state, that as against attaching creditors an extraterritorial assignment has no effect unless valid by the *lex situs*, even though the assignment was valid by the law of the state of the assignor's domicile in which state it was made. To this rule, two qualifications are to be observed. In the first place, property once vested in an assignee will not be disturbed in another state, while retained by him in possession, no matter how defective by the law of the latter state the assignment may be. In the second place, we must remember that in some jurisdictions, where the attaching creditor is domiciled in the same state with the assignor, he may be precluded from disputing the assignment in a foreign court." If the assignment is of real property, it must, in accordance with the doctrine that the *lex situs* governs its transfer, be valid under the laws of the state where the land is situated: *Sortwell v. Jewett*, 9 Ohio, 180.

If the assignment is valid where made, but invalid where the property is situated, its effect, as intimated by Mr. Wharton, depends upon the residence of the creditor who attacks its validity. In such a case, the assignment will not be sustained as against a creditor who resides in the state where the property is found: *Bryan v. Brisbin*, 26 Mo. 423; S. C., 72 Am. Dec. 219; *Maberry v. Shisler*, 1 Harr. (Del.) 349; *Herschfeld v. Dexel*, 12 Ga. 582; *Varnum v. Camp*, 13 N. J. L. 326; S. C., 25 Am. Dec. 476; *Moore v. Bonnell*, 31 N. J. L. 90; *Beirne v. Patton*, 17 La. 589; *Gruillander v. Howell*, 35 N. Y. 657; *Rice v. Courts*, 32 Vt. 460; S. C., *post*, p. 597; *Martin v. Potter*, 34 Id. 87; *Richmondville Mfg. Co. v. Prall*, 9 Conn. 487; *Zipcey v. Thompson*, 1 Gray, 243; *Boyd v. Rockport Steam Cotton Mills*, 7 Id. 406. This rule has obviously no special significance as regards assignments of real property, which are unquestionably controlled by the *lex situs*: See *Osborn v. Adams*, 18 Pick. 245; *Houston v. Nowland*, 7 Gill & J. 480. A few decisions establish some im-

portant limitations. Thus in *Wales v. Alden*, 22 Pick. 245, it is held that where goods in New York are assigned in that state in accordance with its laws, for the benefit of creditors, to a citizen of Massachusetts, the assignee was not to be charged in the latter state for the goods, on a trustee process sued out by one of the creditors, who was a citizen of Massachusetts; and see *Goddard v. Winthrop*, 8 Gray, 180. This, it will be observed, is in strict accordance with the doctrine which considers that personal property has a *situs* in regard to the operation upon it of an extraterritorial assignment for the benefit of creditors. Again, it was decided in *Richardson v. Forepaugh*, 7 Id. 546, that an assignment, made by a citizen of Pennsylvania, and valid by the laws of that state, will be sustained in Massachusetts, as against a citizen thereof, who, since the assignment, purchased a promissory note, made by the debtor in Pennsylvania to a citizen of that state, and which was held by the payee, and overdue at the time of the assignment. In order, also, that the rule should operate, and the claims of the resident creditor be enforced over the foreign assignment, there must be a conflict of rights. Therefore an assignment of a chose in action, in conformity with the laws of New York, where the assignor resided, will allow the assignee to maintain an action to collect the same, in the courts of Ohio, against a citizen of the latter state, in the absence of any set-off or other defense to such action, or of any lien or charge against the claim under its laws, notwithstanding the assignment would be invalid in Ohio: *Fuller v. Steiglin*, 27 Ohio St. 355; S. C., 22 Am. Rep. 355. In Pennsylvania, it is provided, by the act of May 3, 1855, that where an assignment for the benefit of creditors of property in Pennsylvania is made by a person who is a resident out of the state, the assignment may be recorded in any county where the estate may be, and take effect from its date, provided that no *bona fide* purchaser, mortgagee, or creditor, having a lien thereon before recording, and not having actual notice thereof, shall be affected or prejudiced. Therefore a debt due to a non-resident is bound by a foreign attachment issued in Pennsylvania, notwithstanding a previous assignment, if the assignment is not recorded, and no notice of it is given to the attaching creditor: *Philon v. Barnes*, 50 Pa. St. 230; and see *Warner v. Jaffray*, 96 N. Y. 248; S. C., 48 Am. Rep. 616, decided under this statute; but an assignment of personal property, valid by the laws of the domicile, is effective without recording, as against the assignor: *Smith's Appeal*, 104 Pa. St. 381; *quare*, Would it not be valid as well in case of real property? See also *Evans v. Dunkelberger*, 3 Grant Cas. 134.

If, however, the creditor does not reside in the state where the property is situated, he will not be permitted to attack as invalid in that state an assignment of personal property made in another state in accordance with the laws of the latter: *Sanderson v. Bradford*, 10 N. H. 260; *Moore v. Bonnell*, 31 N. J. L. 90; *Whipple v. Thayer*, 16 Pick. 25; S. C., 26 Am. Dec. 626; *Daniels v. Willard*, 16 Pick. 36; *Burlock v. Taylor*, Id. 335, 339; *Martin v. Potter*, 11 Gray, 37; S. C., 71 Am. Dec. 689; *Todd v. Buckman*, 11 Me. 41, 44; *Atwood v. Protection Ins. Co.*, 14 Conn. 555; *Richardson v. Leavitt*, 1 La. Ann. 430; S. C., 45 Am. Dec. 90; *Bholen v. Cleveland*, 5 Mason, 174; *contra*: *Stricker v. Tinkham*, 35 Ga. 176; *Mason v. Stricker*, 37 Id. 262. On principle, a different rule should prevail when the assignment operates on real estate, the *lex situs* governing: *Loring v. Pairo*, 10 Iowa, 282, 287; S. C., 77 Am. Dec. 108; *Gardner v. Commercial Nat. Bk.*, 95 Ill. 298; but this has been expressly or tacitly denied by other cases: *Bentley v. Whittemore*, 19 N. J. Eq. 462; *Chafee v. Fourth Nat. Bk.*, 71 Me. 514; S. C., 36 Am. Rep. 345; *Merchants' Bank v. Bank of United States*, 2 La. Ann. 660.

An assignment executed in one state and invalid under its laws will, of course, not be sustained in another state, where it is also invalid: *Graves v. Roy*, 13 La. 454; S. C., 33 Am. Dec. 568. And an assignment made by a non-resident debtor will not suspend or dissolve a previous attachment: *Pierce v. Crompton*, 13 R. I. 312. An assignment executed in one state, but with express reference to another, in which it is intended to have its first operation, is to be treated, in passing upon its validity, as if executed in the latter: *Richardson v. Rogers*, 45 Mich. 591.

In some states, decisions have been made which do not accord with the foregoing rules, established by the weight of authority. Thus it has been held that the legal *situs* of personal property follows the domicile of the owner, and the law of the actual *situs* protects the claims of creditors domiciled there, only against transfers by operation of law. Consequently, a voluntary assignment of personal property for the benefit of creditors, valid where made, will pass the property in another state, as against a subsequent attachment by citizens of the latter, although the assignment is invalid under its laws: *Speed v. May*, 17 Pa. St. 91; S. C., 55 Am. Dec. 540; *Law v. Mills*, 18 Pa. St. 185; *Mowry v. Crocker*, 6 Wis. 328, 331; S. C., 6 Am. Law Reg. 737; *Castle v. Webster*, 2 Wall. jun. 131; *Dundas v. Bowler*, 3 McLean, 397, 401; and see *Newman v. Bagley*, 16 Pick. 570; *Means v. Hapgood*, 19 Id. 105. In some states, it is also held that voluntary assignments for the benefit of creditors, the only consideration of which is the acceptance of the trust by the assignee, are invalid against attachments, except so far as assented to by creditors. This rule seems to be applied alike to assignments made within and those made without the state, as far as resident creditors are concerned: *Fall River Iron Works Co. v. Croade*, 15 Pick. 11; *Pierce v. O'Brien*, 129 Mass. 314; S. C., 37 Am. Rep. 360; *Faulkner v. Heyman*, 23 Cent. L. J. 61 (Sup. Ct. Mass.), commented upon in Id. 51, note; *Fox v. Adams*, 5 Me. 245; *Hoyer v. Alexander*, 108 Ill. 385; compare *Train v. Kendall*, 137 Mass. 366; *May v. Wannemacher*, 111 Id. 202. Some of these cases would always give a preference to resident creditors, although the assignment is valid where made and valid where the property is situated: See *Fox v. Adams*, *supra*; but this ruling is founded upon a misinterpretation of an early Massachusetts case: *Ingraham v. Geyer*, 13 Id. 146; S. C., 7 Am. Dec. 132, explained in *Blake v. Williams*, 6 Pick. 286, 307.

RICE v. COURTIS.

[32 VERMONT, 460.]

CHANGE OF POSSESSION IS RULE OF LOCAL POLICY UNIFORMLY REQUIRED IN TRANSFER OF ALL PERSONAL PROPERTY situated in Vermont, in order to place it beyond the reach of process against the transferor, and is not controlled by the law of the state where the contract is made.

ASSIGNMENT FOR BENEFIT OF CREDITORS OF PERSONAL PROPERTY SITUATED IN VERMONT REQUIRES CHANGE OF POSSESSION, in order to place the property beyond the reach of process against the assignor, although the assignment is made according to the laws of another state.

CHANGE OF POSSESSION OF PERSONAL PROPERTY IS NOT EFFECTED BY MERE NOTICE OF ASSIGNMENT given by an assignee, for the benefit of creditors to a third person in whose possession the property was, so as to place the property beyond the reach of process against the assignor. It seems that the assignee should have made the third person his bailee.

TRESPASS for a quantity of dry goods and other personal property. On December 17, 1856, William and Marcus Cane, who were residents of New York, made in that state an assignment of all their property to the plaintiffs, Rice & Danenbaum, for the benefit of creditors. The property in question was, at the time, in the possession of Marcus Cane, at Vergennes and New Haven, in Vermont. On December 18th, Danenbaum went to Vergennes, where Marcus Cane was, and on the next day took possession of the greater part of the property. Cane had left the remainder of the property at New Haven, in charge of one Stow. Danenbaum, on December 20th, gave notice to Stow that the goods in his possession had been assigned to the plaintiffs, but took no further steps in relation to any change of possession. On January 2, 1857, the defendant, a resident of Massachusetts, attached the property, which still remained at Vergennes and New Haven in the same position as left by Danenbaum, upon a writ against William and Marcus Cane. The assignment conformed to the laws of New York, but did not comply, in several particulars, with the Vermont statutes of 1852 and 1855, relating to assignments for the benefit of creditors. The jury were directed to return a verdict for the plaintiffs for the value of the property, both at Vergennes and New Haven. The defendant excepted.

George F. Edmunds and William G. Shaw, for the plaintiffs.

L. E. Chittenden, for the defendant.

By Court, REDFIELD, C. J. The main question involved in this case is the same as that just decided in the case of *Hanford v. Paine*, 32 Vt. 442 [*ante*, p. 586]. But there is here the further question, whether any change of possession is requisite in order to put property in this state, when assigned for the benefit of creditors by an act done legally out of the state, beyond the reach of the process of our courts against the assignor.

The only ground upon which it is urged that such a change of possession is required in order to perfect the assignment when made out of the state is, that this is a rule of policy uniformly required in the transfer of all personal property within the state as a visible index of its being no longer liable upon process against the former owner; that it is no part of the contract of assignment to be controlled by the law of the place of assignment, but a matter purely of local policy, to prevent fraud, and therefore not a matter to be controlled by the con-

tract, or by the law governing the contract, but a local form or act to be governed by the law of the forum where the property is situated and the remedy sought.

There is no doubt of the existence and universal recognition of such an exception to the operation of foreign contracts, valid by the law of the place where made. The rule is more commonly illustrated by foreign contracts affecting religion, morals, or state policy, the enforcement of which, in our courts, would be of evil example to our citizens. We may suppose the case of an action to recover damages for some failure to perform a recognized duty by the priest or other officials connected with the sacrificial rites of the pagan religion, in some country with which our republic maintains friendly diplomatic relations, or some proceedings to enforce contracts for the endowment of pagan temples, or the maintenance of the general institutions of the faith of some country not Christian. The trial of such an action would involve, of course, the examination and comprehension, to some extent, by the jury, of the general subject-matter, which could scarcely fail to produce a corrupting influence upon the citizens of a professedly Christian country.

The same course of reasoning will illustrate the impropriety of giving relief, by way of action, for the non-performance of contracts made in a foreign country, affecting duties and obligations, when their sense of propriety is in conflict with our own. For instance, contracts for the destruction of one's parents, or for prostitution, or for the maintenance of fifty wives, which is much of the same character with prostitution, according to our views, may all be held perfectly valid in some countries. We all understand that such has been the case in some countries during the world's history. Still, no one would expect to maintain an action here founded upon any such consideration. It would be revolting to the public sense.

The same is true in regard to transactions in conflict with some statutory provisions affecting public police, such as gambling, horse-racing, and the unrestricted sale of ardent spirits, when the transactions forming the basis of the contract have, in any respect, transpired in this state. So, too, in regard to matters affecting trade and merchandise merely, as the inspection of leather, for instance, the violation of any statutory requirement is sufficient ground for denying all remedy upon contracts based upon such consideration, although the article sold here may be of the most perfect quality, far above the statutory requirement.

It is now claimed that the requirement of a change of possession in the transfer of personal property, in order to put it beyond the reach of the process of our courts against the former holder, is a matter so far affecting the settled policy of our jurisprudence upon the subject that it cannot be dispensed with, out of deference or comity to the law of any other state. This case is not as obvious as some of those already stated.

It does not depend upon the question whether the rule of policy which is contravened by a foreign contract is of a statutory character or one established by the decisions of the courts. It depends upon the point, how far it is a matter affecting the settled and uniform policy of the state, so as to be applicable to all similar transactions without the state, something local and permanent, pertaining to the local policy of the forum, which is not transitory or a thing pertaining to the contract. If it be of this character, it can no more be dispensed with, out of deference to the law governing a foreign contract, than could the institutions of religion or the fundamental principles of morality.

The subject may be illustrated by the contract of sale. The contract itself must be so executed as to be valid by the law of the place where made, in contemplation of the courts. That is commonly the law of the place of the domicile of the seller, unless the contract is made with reference to the law of some other place. It is not always the law of the very place where the contract is in fact made, but the law with reference to which the contract is presumed to have been made, that governs the incidents of the contract itself and determines their extent and validity. But the contract, when made in conformity to these incidents, will be effectual to transfer the title of things personal, wherever situate, unless it contravenes some requirement of the local law which affects the transfer of all similar property within the jurisdiction. If the requirement affect the contract merely, as, for instance, that it be in writing or under seal, it will not extend to contracts executed in other states. But if it be something adhering to the property itself, then it will affect all contracts in relation to such property, wherever made. As, for instance, those regulations in regard to assignments for the benefit of creditors, in the act of 1852, if made to apply to all personal property within the state, could not be dispensed with, even in reference to assignments made out of the state. But as they were made to attach only to this particular class of contracts, they are only binding with reference

to such contracts made within the state, or by an assignor domiciled within the state at the time.

There is no doubt this requirement of change of possession is a rule of policy to a considerable extent, and one which in this state has been regarded of very essential importance to the security of good order and the just rights of our citizens. It is, too, a rule which is made to apply to all personal property which is liable to attachment, whether in the ordinary mode or by process of foreign attachment. There is no other similar requirement which is made to attach to the property, and to all personal property liable to attachment, and not to the contract of transfer.

We say, indeed, sometimes that the sale without a change in the possession is not perfected as against creditors. This is not precisely accurate. What we mean is, that the property is still liable to attachment upon process against the former holder, because an act has been omitted which is indispensable to release it from that liability. And this is an act affecting the rights under process only. We thus make the provision virtually a part of the process as to all personal property permanently located in this state, and not by statute exempt from process. It thus becomes a matter governed exclusively by the law of the forum.

It is true that out of comity we do not apply it so as to defeat rights acquired in other states as to property having its locality there. This would be to work fraud and injustice, and offensively to divest rights acquired *bona fide* under the laws of a foreign state: *Taylor v. Boardman*, 25 Vt. 581; *Jones v. Taylor*, 30 Id. 42.

The requirements of the statute exempting one's last cow from attachment was held to be a matter pertaining to the remedy, and as such, extending to all process, whether mesne or final, within the state, whether the defendant or debtor resided within the state or not, or whether the property be permanently within the state or only came here casually: *Haskill v. Andros*, 4 Vt. 609 [24 Am. Dec. 645]. And property exempt by statute from process may be legally transferred, as to all the world, without any change of possession: *Foster v. McGregor*, 11 Id. 595 [34 Am. Dec. 713]. This statutory exemption, being in effect a part of the process, the requisite change of possession in regard to property not exempt is thus something affecting the process itself, as it seems to us, rather than the contract of transfer.

It is not, indeed, so far a part of the process as to divest rights already acquired in other states in reference to property casually coming within our jurisdiction. That would be to apply the process to property exempt from its operation, both by the contract of the parties and the law of the place where the property is situated.

But whether we call it a part of the remedy and a matter pertaining to our process, which to some extent it must be regarded, or call it a universal rule of policy in regard to the transfer of personal property situate within the state and having a place of more or less permanency here at the time of the transfer, so far as the right of attachment is concerned, it has been sufficiently shown already, that the requirement has its chief reference to and operation upon the rights of those who desire to attach or levy upon it with a view to enforce legal remedies.

This view sufficiently disposes of the distinction attempted to be made between the rights of this defendant to hold this property, because of the want of change in the possession, and the case of a strict and technical creditor, which the defendant probably is not, according to the usual definitions of that term. This change of possession is requisite to defeat the right to attach or to levy upon the property, and is not limited to the case of creditors, although in popular language it is more commonly so expressed. Our books abound with the expressions, that a *bona fide* sale without a change of possession is not valid as against creditors. But to be strictly accurate, it should be said that such sales do not prevent the property from being attached upon process against the vendor.

And that this is the real point of the doctrine is made apparent by the consideration that one may attach property in this state so situated, notwithstanding he may have full notice of the transfer, and have no reason to doubt or question its perfect fairness and adequate consideration. But in regard to subsequent purchasers the rule is otherwise. They cannot ordinarily purchase and hold property, although they first obtain the delivery, if, at the time of the purchase, they had full notice of a *bona fide* sale to another and the payment of the price. Such a purchase is not regarded as *bona fide*. This is certainly the rule of the English law. The statute of 27 Elizabeth only extends to voluntary conveyances. By the English law, as at present understood, a creditor who has knowledge of a *bona fide* sale of property by his debtor, and

the payment of the price, which would change the title as between the parties to the sale, cannot justify attaching the property. But in this state we regard the want of change of possession as a fraud in law, so far as the processes of our courts are concerned. To that extent, it is the same as if no sale had been made. And we have applied this rule to all personal chattels remaining within the state at the time of transfer and not exempt from attachment, and to all modes of transfer, whether of the absolute title or the creating of a lien by way of pledge, a mortgage, or by assignment for the benefit of creditors. So that it will be necessary to show such change of possession in the present case, in order to enable the plaintiffs to hold the goods against the defendant's attachment.

The proof in this case shows merely notice to a third party, in whose possession the assignee had placed the goods, as to that portion of them at New Haven. This would be all that is required by the English law to effect a change of possession: Chitty on Contracts, 412 a. But in this state something more is required. It seems to be indispensable, in order to defeat the right of attachment, that the vendee should, in such case, make the person having the goods in his possession his bailee; that he should consent to hold the goods for him. This might be inferred, undoubtedly, from the silence of the bailee, if he was requested to keep them for the vendee. But nothing of that appears in the present case. The rule laid down in *Whitney v. Lynde*, 16 Vt. 579, has been always adhered to in this state, so far as I know.

We are not aware that this rule in regard to the necessity of change of possession, in order to exempt property sold or assigned from attachment, exists, at present, in any other one of the American states. That was the rule in many of them for many years, but after the change of the rule in England, it gradually changed in this country, until it has now become universal, out of this state, to regard the want of change of possession, before the attachment, as, at most, presumptive evidence of fraud, and in many of the states, and probably most of them, at the present time, it is merely evidence of fraud. In that view, it would not defeat the plaintiffs' title that they had not taken possession of the goods before the defendant's attachment, if they could satisfy the jury that the omission to take possession was consistent with the *bona fide* character of the assignment. But with us the decisions have been uniform to require a visible, substantial change of posses-

sion to perfect an assignment against attachments, and it has so far become a part of the settled policy of the state, and seems to us so far connected with the remedy, that, as to property within this state, we could not feel called upon to give an assignment for the benefit of creditors, made in another state, priority over an actual attachment of the property by the process of our courts, without such change of possession. Notwithstanding the validity of the foreign assignment to transfer the property here, we must regard it as still liable to be arrested by the process of our courts, until the assignment is carried into effect by the delivery of possession to the assignee, or his taking such possession. This act of possession is a local act, and its validity is to be determined by the law of the place where it occurs. It attaches to the forum rather than the contract, and is a matter affecting local policy, which no rule of comity could fairly justify us in disregarding out of deference to the law of the place of the domicile of the assignor, even if it were shown that the law of New York did not require such delivery in order to perfect the assignment as against attachments. But that does not very clearly appear. It may still be the law of that state that the same change of possession is requisite to perfect an assignment there as here. But it is enough that such is the law here: See the cases on this subject digested in Burrill on Assignments, c. 25.

In making this discrimination between the contract and the delivery or change of possession, we but carry out the same rule which we should apply to the ordinary contract of sale, where the property was within the state and the owner resided abroad. Any contract of sale valid by the law of the place where made, or where the vendor resided, will transfer the title of the property. But the vendee must here take actual possession before the property is beyond the reach of process against the vendor. We hold the same in regard to assignments for the benefit of creditors. And we have always applied the same rule in regard to the assignment of choses in action. We do not regard the assignee as having perfected his priority against the process of foreign attachment against the assignor until he has given notice to the debtor. This is different from the rule which obtains in New York, and in some, probably most, of the other states. It is there held that the assignment transfers the title, and if it is subsequently attached by way of foreign attachment, even before notice of the transfer to the debtor, the assignment will take priority if

it be made to appear on trial that the assignment was in point of fact prior to the service of the attachment. But in this state the assignment is only regarded as perfected against attachments when notice is given to the debtor, that being regarded as equivalent to a change of possession, and an indispensable prerequisite, in order to put the property in choses in action beyond the reach of the process of foreign attachment against the assignor. This rule of law, in regard to choses in action attached by process of foreign attachment, has been adhered to with great strictness in this state from the earliest times. And we are not aware that it has ever been relaxed. It has sometimes been regarded as an anomaly, and the courts have hesitated in regard to it. But upon examination it will be found to form an essential portion of our law, requiring a change of possession to perfect an assignment as against the process of our courts in favor of persons having rights of action against the vendor.

As no sufficient change of possession was clearly shown in this case as to a portion of the property, and that question was withdrawn from the jury, the judgment is reversed and the cause remanded.

EXTRATERRITORIAL EFFECT OF ASSIGNMENTS FOR BENEFIT OF CREDITORS:
See *Hanford v. Paine*, *ante*, p. 586, and note thereto.

STATE v. HUMPHREY.

[32 VERMONT, 509.]

LARCENY IS COMMITTED BY ONE WHO OBTAINS POSSESSION OF PERSONAL PROPERTY BY CONSENT OF OWNER, under the pretense of hiring it for a temporary purpose, when in fact he intends thereby to wholly deprive the owner of it, and he actually puts it to a different purpose, although he does not sell or dispose of it.

INFORMATION for stealing a horse and wagon. The defendant hired the horse and wagon at the livery stable of one Jennison, in Swanton, under the pretense of driving it to St. Albans, when he in fact intended to get possession of the property and to sell or exchange it. He drove to St. Albans, and thence immediately to Shelburn, where the property was detained for his hotel bill, and afterwards was retaken by the owner. The defendant requested the jury to be instructed that if he hired the horse and wagon, but did not, in point of fact, dispose of them, it was not larceny; but the court refused

to give this instruction, and charged that if the defendant, at the very time he hired the property, intended to steal or wholly deprive the owner of it, it was larceny, although he did not in fact dispose of it, but that he must have intended to convert the property permanently to his own use at the time he hired it. The defendant excepted. The jury returned a verdict of guilty.

William W. White, for the state.

James S. Burt and George F. Houghton, for the defendant.

By Court, POLAND, J. The respondent's counsel claim that, as the horse and wagon came into his possession by the consent of Jennison, the owner, he was not guilty of the crime of larceny, although such consent was obtained by his own false and fraudulent pretense that he wished to hire the same to go to St. Albans merely, when in fact he intended thus to get possession of the property, and then to convert the same to his own use, and wholly deprive the owner of his property. The argument upon this point is founded upon the common definition of larceny, as given in the elementary books, that it is the felonious taking the property of another, without his consent and against his will, with intent to convert the same to the use of the taker.

It is said that in this case the taking was not without the consent and against the will of the owner, and therefore not a felonious taking.

But, as is said by Mr. Archbold, "this must be understood as meaning merely the absence of all free and voluntary consent upon the part of the owner to the party taking his goods and appropriating them to his own use." Where the consent of the owner to the taking has been obtained by fraud and deception, by inducing him to believe that the taker wishes to obtain the property for an honest and temporary purpose, when in fact the design is to wholly deprive him of it, and where no consent would have been given if the real purpose had been disclosed, this is not regarded as any assent by the owner, and the taking for the purpose and design of the taker is against the will of the owner. A consent thus obtained is wholly nugatory, and the taking may be regarded as tortious, and the taker as a trespasser, both civilly and criminally.

The only authorities cited in support of this view are *Felter v. State*, 9 Yerg. 398, and some cases preceding that in the

state of Tennessee. Those cases adopt the reasoning of the respondent's counsel to the fullest extent. But the law is fully established otherwise in England, and so far as we are able to learn, in every state in the Union except Tennessee. It is so laid down by every elementary book on criminal law. It has been repeatedly so held in this state on trials in the county court, and has been regarded as so well settled as to have never before, to our knowledge, been brought before the supreme court. Indeed, in the Tennessee case, it is declared to be a doctrine peculiar to that state, and admitted to be against the doctrine of the English courts and the other states. The general current of decision on this subject seems to us also to be founded upon the plainest principles of natural justice and good sense, and we do not think there is any occasion to abandon what has been so long regarded as a fixed rule of law in this state.

2. It is claimed that when the felonious taking is under a pretense of hiring or borrowing the property, the offense is not complete until the taker has converted the property by selling or disposing of it.

This certainly is not necessary in ordinary cases of larceny, where possession of the property is obtained without the knowledge or consent of the owner. It is sufficient in such cases to show that the taker has obtained possession of the property, and that the property is severed from the possession of the owner. Even when the thief is arrested upon the premises of the owner of the stolen goods, it is held that the offense is complete. This ingredient of the offense certainly is not included within the ordinary definition of larceny, that only requires a taking, etc., "with intent to convert the same to the use of the taker;" not that an actual conversion should be proved. It does not become necessary to decide in the present case whether the offense is complete before the property has been carried beyond, or put to any other use than that contemplated by the pretended and fictitious bailment. We do not see, upon principle, why it is not as soon as the possession is obtained from the owner, provided the fraudulent and felonious intent be proved, for that very taking is of itself a conversion.

Practically, however, this becomes unimportant, because in all this class of cases the evidence of the subsequent conduct and acts of the party, in making a different use of the property from that contemplated by the pretended hiring, and appropriating the property to his own use, furnishes the evidence

that the original intent was felonious, and that the hiring or borrowing was a mere device to obtain the possession from the owner and an opportunity to steal the property.

We have been referred to notes of decisions in the United States criminal digest, of *Lewer v. Commonwealth*, 15 Serg. & R. 93, and *State v. Lindenthall*, 5 Rich. 237 [57 Am. Dec. 743], in which it is stated to have been held that when one obtains possession of another's goods by false representations, with the fraudulent intent to convert them to his own use, and does convert them to his own use, it is larceny. We have not seen the cases, and do not know how far they warrant the doctrine of the note, that there must be an actual conversion by the fraudulent bailee to constitute the crime of larceny. The notes of these decisions do not seem to support the idea that the conversion must be by a sale of the property.

The facts proved in this case show an actual conversion by the respondent. Even if the hiring had been *bona fide*, and without any fraudulent design, the subsequent driving the horse and wagon from St. Albans to Shelburn was an actual conversion of the property by the respondent, and trover could have been maintained without any demand and refusal. Those cases, therefore, do not seem at all to conflict with the ruling of the court below in this case.

The only case cited which seems to support the view that there must be an actual disposal of the property in order to constitute the offense is *Regina v. Brooks*, 8 Car. & P. 295; S. C., 34 Eng. Com. L. 396. That case is merely a *nisi prius* ruling of the late Chief Justice Tindal, whose *nisi prius* opinion we concede to be entitled to as much weight as that of any single judge.

In that case, the defendant hired a horse and gig in London, to go to Windsor, to be gone two days. Instead of going to Windsor, he went in the opposite direction to Rumford, where he offered the horse and gig for sale, but was unable to effect a sale because his appearance and manner excited so much suspicion, and upon such suspicion he was there taken into custody. Chief Justice Tindal directed an acquittal. The only reason stated by the reporter is as follows: "Here has been no actual conversion of the property, only an offer to sell."

The case seems to be identical almost in its facts with *Spencer's Case*, 1 Lew. 197, before Bayley, J., and *Armstrong's Case*, Id. 195, before Holroyd, J., in each of which it was submitted to the jury to say if the original design in obtaining the

property was to steal it, and if so, it was held that it was larceny.

Mr. Greaves, the English editor of the recent edition of Russell on Crimes, one of the most eminent of modern crown lawyers, treats the case of *Regina v. Brooks, supra*, as erroneous, and as conflicting with the other decisions in the English courts. We are unable to find that that case has been followed either in England or in this country. The reason given, that there was no conversion of the property, is unfounded, for the driving of the horse and gig to another place was clearly a conversion. We feel justified in wholly disregarding the authority of that case, as opposed to both authority and reason.

The result of such a doctrine would be, that when property is thus obtained by a fraudulent device, the taker could never be convicted of larceny so long as he only kept the property for his own use, however effectually he might have deprived the owner of his property. The absurdity of the result is a sufficient answer to the proposition itself.

The exceptions are therefore overruled.

LARCENY, WHEN ONE IS GUILTY OF: See extensive note to *State v. Homes*, 57 Am. Dec. 271, and particularly 281; *Dignocitty v. State*, 67 Id. 670, and note.

STATE v. HARTIGAN.

[22 VERMONT, 607.]

ONE IS GUILTY OF ASSAULT WITH INTENT TO COMMIT RAPE, if he lays hold of a woman with the intention of having sexual intercourse with her against her will, and she resists for a time, but ultimately yields.

INFORMATION containing two counts, the first charging the respondent with the commission of rape, and the second with an assault with intent to commit rape, upon one Orilla Vincent. The woman, who was the hired girl of one Rockwell, testified that when alone in the house, the respondent, a hired man, entered, and after some conversation, took hold of her and pushed her against a flour barrel. She told him to let her go, as he hurt her, when he forced her upon the floor. He lay upon her with his mouth to hers, so that she could not cry out, and held her arms with his hands. Rockwell testified that he saw prints of nails and black and blue spots on the

woman's arms. Two physicians and surgeons testified, on behalf of the respondent, that from the size and appearance of the parties, it was practically impossible that sexual intercourse could have taken place, as stated by the woman, unless she had consented. The court charged the jury, as set forth in the opinion, and the respondent excepted. The respondent was acquitted on the first count, and convicted on the second.

W. F. Bascom and J. W. Stewart, for the state.

Roberts and Chittenden, for the respondent.

By Court, KELLOGG, J. The information against the respondent in this case contained two counts, the first charging him with the commission of the crime of rape upon one Orilla Vincent, and the second charging him with an assault upon the same woman, with intent to commit rape upon her. On trial, the respondent was acquitted on the first count, and convicted on the second count.

The evidence on the trial is detailed in the respondent's exceptions, and the court instructed the jury that if they found that the respondent, upon the occasion when, as it was alleged and testified to by the woman Vincent, each of the said crimes was committed, laid hold of her person, and pushed her, as stated in her testimony, with the intention and for the purpose of having sexual intercourse with her by force and against her will, and that she resisted for a time, but ultimately yielded, they might find him guilty under the second count, although they might find that the sexual connection then had by him with her, which followed, was with her consent. The respondent excepted to the charge of the court on this point.

Whatever might be our opinion respecting the sufficiency of the evidence to warrant a conviction of the respondent on either count, our duty at this time is to be confined to the examination of the errors assigned in the charge of the court to the jury, to which the respondent's exceptions exclusively relate. It is an assumption of the very point in controversy to say that the facts given in evidence constitute one entire transaction, and that as the jury have acquitted the respondent of the greater offense, he cannot be convicted of a lesser one on testimony which was a part of the evidence introduced to establish his guilt of the greater offense. The jury have found, by their verdict, that the respondent did, on the occasion testified to, assault the woman with the intention and

for the purpose of having sexual intercourse with her by force and against her will, and that she resisted for a time, although she ultimately yielded. These facts are all which are essential to be established, in order to make out the proof that the crime was complete. And we consider that the charge of the court, in respect to the resistance of the woman, referred by reasonable intendment to a real resistance on her part, made in earnest and good faith, and that the charge so understood was all which could be required on that point.

But it is claimed that the subsequent yielding and consent of the woman to the sexual intercourse which followed has relation back to and covers the preceding acts; or, stated in equivalent words, that the ultimate consent of the woman should have a retroactive effect by relation, and operate as a condonation of a crime which had become complete. The rules of criminal law are not founded upon legal fictions, and the doctrine of relation, however useful it may be as a rule defining or regulating private rights in a civil suit, has no application in criminal proceedings. On this point, the rule, as stated in 3 Greenl. Ev., sec. 211, is that if the woman was first violated and afterwards forgave the ravisher and consented to the act, still the particular offense in question being committed by force and against her will at the time of its commission, the crime is in legal estimation completed; these circumstances being only admissible in evidence on the part of the respondent to disprove the allegation of the want of consent. The same rule is stated in 1 Russell on Crimes, 677, and also in Roscoe's Criminal Evidence, 860. It has never been regarded as a legal excuse for the consummated offense that the woman consented after the fact, and we regard this principle as being applicable to the case of an assault with an intent to commit a rape as well as to the higher offense. It is, in our judgment, decisive of the questions raised in this case, and as we find no error in the instructions given by the court to the jury, the respondent's exceptions are overruled.

On the application of the respondent, the case was remanded to the county court to pass sentence.

FISK v. BRACKETT.

[82 VERMONT, 702.]

ASSIGNEES IN INSOLVENCY OF NON-NEGOTIABLE CHOSES IN ACTION CANNOT MAINTAIN ACTIONS THEREON in their own names in another state, although expressly empowered to do so by the laws of the state where they were appointed.

ASSUMPSIT for goods sold and delivered. Arthur Stowell, a resident of Massachusetts, sold the goods in question to the defendant, also a resident of that state. After the sale, Stowell became insolvent, and the plaintiffs were appointed his assignees under the laws of Massachusetts. The plaintiffs claimed the right to maintain the action in their own names, because expressly empowered to do so by the laws of Massachusetts. Judgment was rendered for the plaintiffs, and the defendant excepted.

E. Hutchinson, for the plaintiffs.

Washburn and Marsh, for the defendant.

By Court, POLAND, J. There is no subject upon which greater conflict and confusion exists, both in the decisions of courts and among elementary writers, than upon the legal effect of an assignment under the bankrupt or insolvent laws of a country, upon the property of the bankrupt or insolvent in another jurisdiction. But in the present case, it does not become necessary at all to enter into this extensive field of legal discussion, for at the time this debt was contracted the defendant and the insolvent were both residents of Massachusetts; the debt was contracted there, and all the parties continued to be residents of that state up to and after the time of the proceedings in insolvency, and the transfer of the effects of the insolvent to the plaintiffs under those proceedings. No question is now made as to the regularity of those proceedings under the insolvency laws of Massachusetts, nor as to the sufficiency of the proof of them, upon the trial in the county court. The right of the several states to pass such laws, and thus divest the insolvent of all his property, and vest the same in the assignees in cases properly within their jurisdiction, is now fully established, and is not questioned here. The plaintiffs, then, by virtue of these proceedings in Massachusetts, became entitled to this debt against the defendant, and to recover it for the purpose of distributing it with the other assets of the insolvent among his creditors. Nor is there any

question made but that, as against the defendant, the plaintiffs have the right, in some form, in our courts, to a legal remedy to enforce collection of the debt. In Massachusetts, by force of their statute, the plaintiffs would be entitled to sue in their own names.

This brings us to the single question presented by the case, Can these plaintiffs maintain an action in our courts to recover this debt in their own names? An assignment of such a chose in action, not negotiable by the law merchant in this state, would not enable the assignee to sue in his own name, though his rights would be regarded and protected by our courts. Any legal proceedings to enforce payment of the debt must be in the name of the assignor, but the assignee would be allowed to control and manage the suit, and collect the judgment against any interference by the assignor. If, then, the plaintiffs can sue in their own names, it is wholly by force of the statute of Massachusetts. The plaintiffs' counsel does not claim that the laws of Massachusetts have any force, as such, beyond the territorial limits of that state, but insists that as the transfer of this debt to the plaintiffs was valid by the laws of that state, and as one of the incidents of that transfer was to give the plaintiffs a right to sue in their own names in that state, that the same legal effect should be given to it in this state. On the other hand, it is insisted by the defendant that this is not a matter pertaining to the right of the plaintiffs under the assignment, but relates wholly to the form of the remedy, and that though the courts of this state should regard the rights of the plaintiffs fully to recover this debt, still that they should be required to pursue the forms of remedy provided by the laws of this state, and not those of the state of Massachusetts. The general rules laid down in the books and cases as to what law is to govern in determining the validity, obligation, construction, and effect of the contract, and what shall govern as to the form of the remedy to enforce it, are uniform; the *lex loci* regulates the former, and the *lex fori* the latter. The only difficulty arises in the application of the rules in determining to which class this question belongs. It appears to us that there is some impropriety in likening this transfer to a case of a transfer by contract between the parties, so as to bring it within this rule. The reason given why a contract between parties is to be construed by the law of the place where it is made is, that the parties are presumed to have contracted in reference to it, and intended to

FISK v. BRACKETT.

[82 VERMONT, 793.]

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be governed by it. But this transfer was not made by any consent of parties; it was by a proceeding wholly *in invitum*, and though legally valid and binding, it rests wholly upon the strength of legal enactment. In some of the numerous cases where the effect of bankrupt assignments have been discussed, it is said that such transfers, made by virtue of the laws of the state, have the presumed assent of the bankrupt, because he is a citizen of the state, and owes obedience to its laws; but in many others of these cases any such assumption is denied. We deem it of no importance to examine this legal abstraction.

Does it follow that a transfer of a chose in action in our state, by the act and assent of the parties, is to have all the legal effects and incidents in every other state, that it might be entitled to where made? Suppose that in Massachusetts there should exist a law enabling the assignee of any chose in action to sue upon it in the courts of that state in his own name, would that authorize such assignee of a debt not negotiable by the laws of this state to maintain an action upon it in our courts in his own name? It seems to us that it would not, any more than it would entitle him to adopt some particular form of action given by the laws of that state, but not known to our law. That the plaintiffs would be entitled to sue here in their own names for the recovery of property the title to which vested in them by the assignment, we do not doubt, for such would be the legal effect and legal remedy given by our law to the transfer of the title to personal property.

But it seems to us quite another thing to authorize them to sue in their own names upon a contract of the insolvent here, by virtue of the statute of Massachusetts. The distinction, we think, is plain and clear. The real owner of a note or bond, made to another, not negotiable, or not legally assigned, might maintain trover for the conversion of it; but if he wished to enforce payment by the maker or obligor, he must sue in the name of the payee or obligee. We have felt every inclination to get over this objection, if possible, for it is merely technical; but we are satisfied that, upon principle, the right to sue by the plaintiffs in their own names exists only by force of the statute of Massachusetts, and cannot be regarded as operative beyond the territorial force of the statute, and that in this state we can give no other force to the assignment than to any legal assignment of the same debt here, and that the remedy must be pursued here in the name of the as-

signor. The case of *Pickering v. Fisk*, 6 Vt. 102, seems fully to support this conclusion. That was an action upon a bond given by the defendant, as sheriff of the county of Grafton, New Hampshire, to the treasurer of the state, for the faithful and due execution of his office, and setting forth a breach of duty by the defendant, as sheriff, in not collecting and returning an execution in favor of one Moore. It was conceded that, by the statutes of New Hampshire, such an action could be sustained there, but it was held not to lie in this state. The whole subject is most ably examined and elucidated in the opinion given by Phelps, J.

The very point here raised has often been before the courts in this country, and from the examination we have been able to give to it, we think the great balance of judicial opinion is adverse to the maintenance of such action in the name of the foreign assignee.

In *Orr v. Amory*, 11 Mass. 25, it was decided that the assignees of an insolvent debtor in Pennsylvania could not maintain an action in their own names against a debtor of the assignor in Massachusetts.

In *Bird v. Caritat*, 2 Johns. 342 [3 Am. Dec. 433], it was held that an action in the name of an English bankrupt was properly brought, instead of being brought in the name of his assignees. In the opinion given by Kent, C. J., it is said that the courts here will give effect to the title of the foreign assignees, but that the mode of proceeding must be governed by the law of the place where the suit is brought, and as the debt was not assignable at common law, nor by the law of New York, the assignees could not sue in their own names.

So in *Raymond v. Johnson*, 11 Johns. 488, the plaintiff had become an insolvent under the insolvent law of New Jersey, but it was held that this action in New York was properly brought in his name, and not in the name of his assignee.

This same doctrine is laid down in *Merrick's Estate*, 5 Watts & S. 9, and incidentally stated in many other cases.

The whole subject is fully examined by Judge Story in his *Conflict of Laws*, and all the authorities collected and examined. He says, section 565: "And this rule [that choses in action are not assignable] is applied to assignments of choses in action, made in foreign countries, although the assignee might be entitled to found an action thereon in such foreign country in his own name, in virtue of such assignment. For such have been thought to belong, not so much to the right and merit of

the claim as to the form of the remedy. Thus it has been held that a Scotch assignee of a bankrupt could not maintain a suit in his own name in England for a chose in action of the bankrupt which was admitted to pass under the assignment. In America, contradictory decisions have been made upon the same point, some decisions affirming and others denying the right of the assignee to sue in his own name, though the weight of authority must now be admitted to be against the right." But by an examination of the cases cited by Judge Story to this section, I do not find any case where it has been decided that such foreign assignee can maintain an action at law here in his own name.

It is said by judges in many of the cases, that our courts will respect the rights of the foreign assignee, and that he will be permitted to sue in our courts, etc., but generally all these *dicta* occur where the general effect of such foreign assignment was under consideration, and whether the foreign assignee had here any rights under it, and not where any question arose as to the form in which his remedy must be pursued. Such, generally, are the cases which the industrious examination of the plaintiffs' counsel has brought to our attention. We are not aware of any case in this country where the foreign assignee has been allowed to sustain an action at law in his own name on a non-assignable chose in action due the bankrupt. The only English case which seems to warrant such an action is *O'Callaghan v. Thomond*, 3 Taunt. 82, where it is said that the court held that the assignee of an Irish judgment (which is assignable in Ireland), could maintain an action in his own name in England. On an examination of that case, it does not appear very distinctly what was decided, though the court intimated such an opinion. But Judge Story says of this case "that it seems to stand alone, and therefore can scarcely be thought unexceptionable in point of authority." He quotes *Folliott v. Ogden*, 1 H. Black. 137, and *Wolff v. Oxholm*, 6 Mau. & Sel. 99, as opposed to it. The case of *Jeffery v. McTaggart*, Id. 126, the case of the Scotch assignee, seems directly opposed to it.

There are many other cases which support the same general view of what pertains to the remedy merely, and therefore governed by the law of the forum.

In New York, it has been held that a note in form negotiable, executed in Connecticut (by the law of which state such note could not be negotiated so as to entitle the assignee to

sue in his own name there), might be sued in the name of the indorsee in the courts of New York

So in the same state it has been held that upon an instrument executed in Virginia, having a scroll in the place of a seal, and which by the law of Virginia is equivalent to a seal, the action must be brought upon it as a simple contract: *Warren v. Lynch*, 5 Johns. 239.

A similar decision was made in New Hampshire: *Douglas v. Oldham*, 6 N. H. 150.

The same principle has been decided in Maryland: *Trasher v. Everhart*, 8 Gill & J. 234.

The judgment below we regard, therefore, as erroneous, and the same is reversed, and the case remanded.

EXTRATERRITORIAL EFFECT OF ASSIGNMENTS IN INSOLVENCY AND BANKRUPTCY, AND FOR BENEFIT OF CREDITORS: See note to *Hanford v. Paine*, ante, p. 594; also *Abraham v. Plestoro*, 20 Am. Dec. 738; *Robinson v. Crowder*, 17 Id. 762; and as to the right of the assignee in bankruptcy to sue, see *Holmes v. Ramson*, 8 Id. 581.

WHEELER v. WHEELOCK.

[33 VERMONT, 144.]

DECLARATION IN ACTION FOR BREACH OF WARRANTY OF SOUNDNESS OF HORSE, which alleges that the horse was unsound, is sufficient without specifying the particular kind of unsoundness.

IT IS NO VARIANCE TO PROVE THAT SELLER OF HORSE REPRESENTED and warranted the animal to be sound, so far as he knew, and that in fact he knew him to be unsound, in an action for false and fraudulent representations of the soundness of the horse, joined with a count for a false warranty of soundness with knowledge of the unsoundness.

CASE. The facts are stated in the opinion.

N. A. Taylor and E. E. French, for the plaintiff.

L. C. Wheelock, in propria persona.

By Court, *KELLOGG, J.* This is an action on the case for a false warranty of soundness on the sale of a horse. The plaintiff's declaration contains three counts. In the county court, the defendant demurred to the third count, and pleaded the general issue to the first and second counts. Upon the demurrer, the court, *pro forma*, adjudged the third count insufficient; and the issue of fact was tried by the court.

The first question arising under the plaintiff's exceptions relates to the correctness of the judgment rendered on the de-

murrer. The only cause of demurrer to the third count which is assigned by the defendant is, that this count does not allege or set forth in what the particular unsoundness of the horse consisted, and the case of *Martin v. Blodget*, 1 Aik. 375, is cited to show that this omission has been recognized by this court as a cause of demurrer. This count is in substance a copy from a form given in Chitty's Pleading, and it is stated by that author in his note to the form of the declaration in *assumpsit*, on a warranty of soundness on the exchange of horses (2 Ch. Pl. 141), that, in an action for a false warranty of soundness, the particular unsoundness need not be stated, it being sufficient, in general, to assign the breach in the negative of the words of the contract, and the authorities fully recognize this as a settled rule of pleading: *Harris v. Mantle*, 3 T. R. 307; *Bradshaw's Case*, 9 Co. 60 b; Com. Dig., tit. Pleader, C, 45. The case of *Martin v. Blodget*, 1 Aik. 375, decided that a general averment of unsoundness was not sufficient, and that it was necessary, in assigning the breach, to specify the particular unsoundness complained of, or the declaration would be bad upon demurrer. But in the case of *Parlin v. Bundy*, 18 Vt. 582, the rule, as stated by Chitty, was recognized as being correct, and although the question in that case arose, not upon demurrer, but on a motion in arrest of judgment, the decision is not put upon that ground, and it must be considered as, in effect, overruling the case of *Martin v. Blodget*, 1 Aik. 375. It may be conceded that the cause of action should be fully and specifically disclosed for the information of the defendant, but we think that the breach is well assigned when assigned in the negative of the terms of the contract. Under the present rules of pleading in England, in an action for a breach of a warranty of soundness of a horse, where the declaration was in the usual form, containing a general allegation that the horse was unsound, the court have refused, even on the affidavit of the defendant that he was not aware of the nature of the unsoundness complained of, to order the plaintiff to give particulars of the unsoundness, on the ground that though it might be clear that the horse was not sound, there might be difficulty in saying in what the unsoundness consisted, and that it would be unfair to the plaintiff to confine him to a particular statement of the cause of unsoundness: *Pyllie v. Stephen*, 6 Mee. & W. 813. With this view of the established rules and precedents of pleading, we think that the county court erred in sustaining the demurrer.

This conclusion necessarily involves a reversal of the judgment below, but the exception taken by the plaintiff on the trial of the issues joined on the first and second counts having been fully argued, we have thought it proper to express our opinion respecting that question. The second count sets up as the cause of action certain alleged false and fraudulent representations merely, known to be such by the defendant, and willfully made, whereby the plaintiff was defrauded, and it does not refer to any warranty; and the first count is substantially for a false warranty, alleging the *scienter*, and fraud thereby. The warranty and the representations complained of are alleged to have been made without any qualification. On the trial, the plaintiff proved the warranty or representation by the defendant, upon which he relied for a recovery, to have been that "the horse was sound and right every way, so far as the defendant knew." The court ruled that the proof did not support the declaration. It was held in *West v. Emery*, 17 Vt. 583 [44 Am. Dec. 356], that if, in an action on the case for a deceit in the sale of a horse, the declaration allege an absolute representation of soundness, and a *scienter* by the defendant of its falsity, and the proof shows that the representation by the defendant was that the horse was sound "so far as he knew," and the plaintiff also prove that the defendant in fact knew, at the time of making the representation, that the horse was unsound, this would be no variance; since a representation of absolute soundness and a representation thus qualified, which the defendant knew at the time of making it to be false, bind the defendant to the same extent. When the plaintiff relies upon proof of false and fraudulent representations merely, and not on the breach of an express warranty, as the ground of his action, the fraud is the same, so far as liability is concerned, whether the representation be that the horse is absolutely sound, or only that he is sound so far as the defendant knows, if, at the time of making it, the defendant in fact knew that it was false. We regard the principle settled in the case of *West v. Emery*, 17 Vt. 583 [44 Am. Dec. 356], as applicable to this case, and think that there was no variance, in substance, between the plaintiff's proof and his declaration in respect to the false warranty or representation of soundness, if such warranty or representation was made by the defendant with knowledge of its falsity—the gist of the action being the tort in making the false representation knowingly—and it appears in the case that the plain-

tiff's testimony tended to show, not only that the horse was unsound, but also that the defendant had knowledge of such unsoundness.

The judgment of the county court for the defendant is reversed, and judgment rendered for the plaintiff on the demurrer, and the cause is remanded to that court for a new trial.

BREACH OF WARRANTY OF SOUNDNESS OF HORSE: See *Roberts v. Jenkins*, 53 Am. Dec. 169, note 173-179.

WHITE v. SIMONDS, CONANT, & Co.

[13 VERMONT, 173.]

WHEN CASE INVOLVING TWO OR MORE ISSUES IS SUBMITTED TO JURY, with evidence tending to sustain them all, and a general verdict is rendered, such verdict is *prima facie* evidence that all the issues were found in favor of the party for whom it is rendered; and when a judgment on such a verdict is presented by him to defeat a recovery in a subsequent suit brought on the same cause of action, the burden of proving that the verdict in the first suit was rendered upon an issue presenting only a temporary bar, and that such bar has been since removed, or has ceased to operate, is thrown upon the plaintiff. If a party against whom such a verdict is rendered would avoid this effect of a general verdict, he must see to it that the jury by their verdict declare upon what issue it is rendered.

WHEN JUDGMENT IS PRIMA FACIE BAR, AND NO EVIDENCE IS OFFERED to remove such bar, it is just as conclusive as a matter of fact as though it was absolutely conclusive as a matter of law.

ASSUMPSIT. The opinion states the case.

T. P. Redfield, for the plaintiff.

Peck and Colby, for the defendants.

By Court, PIERPOINT, J. This was an action of *assumpsit* brought on three promissory notes.

For a defense, the defendants relied on a judgments rendered in their favor, in the state of Massachusetts, in a suit on the same notes, brought in the name of William H. Baxter, as evidence, and to sustain it, introduced a copy of the record of such judgment, accompanied with evidence tending to show that the suit there was tried upon two issues, one denying the merits of the plaintiff's claim, and the other only presenting a temporary bar to the plaintiff's recovery. Also, that upon the trial evidence was introduced by them on both issues, as to the three notes, and that a general verdict was returned in their favor, on which judgment was rendered.

The defendants also introduced evidence tending to show that, by the law of Massachusetts, such a judgment would be conclusive in their favor, in a suit like the present brought there.

The court charged the jury, that if they found that in the trial of the case in Massachusetts, the defendants gave evidence upon the issue on the merits, and the question therein was submitted to the jury, and they rendered a general verdict in favor of the defendants, and judgment was rendered thereon, such judgment was conclusive in favor of the defendants in this action, although the question was also submitted to the jury on the other issue, not affecting the merits.

When a case is submitted to the jury involving two or more issues, with evidence tending to sustain them all, and a general verdict is rendered, such verdict is *prima facie* evidence that all the issues were found in favor of the party for whom the verdict is rendered. And when, as in this case, a judgment on such verdict is presented by the defendants to defeat a recovery in a subsequent suit brought on the same cause of action, the burden of showing that the verdict in the first suit was rendered upon an issue presenting only a temporary bar, and that such bar has since been removed, or has ceased to operate, is thrown upon the plaintiff. This principle is fully recognized in *Squires v. Whipple*, 2 Vt. 111; and in *Dixon v. Sinclair*, 4 Id. 354 [24 Am. Dec. 616].

If a party, against whom a verdict is rendered, would avoid this effect of a general verdict, it is incumbent on him to see to it that the jury by their verdict declare upon what issue it is rendered.

But it is said the county court erred in charging the jury that the judgment was conclusive in favor of the defendants in this action.

What the law of Massachusetts is on this subject, or which branch of the tribunal is to decide the matter—the court or the jury—are questions which it is not necessary for us now to determine, inasmuch as no evidence was offered by the plaintiff tending to show that the verdict in Massachusetts was rendered upon any other issue than that as to its merits.

If the plaintiff had offered evidence upon that point, and the court had excluded it, or if they had admitted it and then charged the jury that the judgment was conclusive, in the language given in the bill of exceptions, or if we could see from the manner in which the case is made up that the plain-

tiff had omitted to introduce evidence upon this point in consequence of the ruling of the court, the question would then arise as to the conclusive legal effect of that judgment.

Nothing of this kind appears in the case; but on the other hand, it is quite apparent that the plaintiff relied entirely upon the fact that the verdict in Massachusetts might have been returned upon the issue that presented only a temporary bar, and therefore could have no effect to prevent or embarrass his recovery in this suit. In this state of the case, it is entirely immaterial whether the judgment be regarded as absolutely conclusive or only *prima facie* so, inasmuch as a *prima facie* bar, without anything to remove it, is just as conclusive in this case as a matter of fact as though it was absolutely conclusive as a matter of law, and fully justified the court in telling the jury that it was conclusive in favor of the defendants in this action.

The judgment is affirmed.

JUDGMENT, WHEN BAR TO SUBSEQUENT ACTION: See *Lord v. Chadbourne*, 66 Am. Dec. 290, note 296, where other cases are collected.

VERDICT NOT COVERING ISSUES: See *Settle v. Alison*, 52 Am. Dec. 393, note 396, where other cases are collected.

WHERE PLAINTIFF SUES FOR TWO OR MORE CAUSES OF ACTION properly joined, to which the defendant pleads the general issue, if the jury in their verdict allow him a specified number of his causes of action and say nothing as to the others, the verdict is sufficient to authorize a judgment for him to the extent to which it finds for him, and will bar a second action for the causes of action not mentioned in express words in said verdict: *Wittich v. Tramm*, 62 Am. Dec. 778.

WAIT v. RICHARDSON.

[88 VERMONT, 190.]

ONE TENANT IN COMMON OF LAND CANNOT MAINTAIN TRESPASS QUARE CLAUSUM FREGIT against another for entering upon the common property, claiming exclusive ownership of the whole, and cutting and carrying away all the timber thereon.

TRESPASS *quare clausum fregit*. The opinion states the case. *George N. Dale*, for the plaintiff.

William Heyward, for the defendants.

By Court, BARRETT, J. The declaration in this case was not furnished to the court, but it was treated in the argument as being in trespass *quare clausum*. The statement of agreed facts

shows that, at the time of the alleged trespass, the parties held title to the *locus in quo* in undivided moieties, thus being tenants in common; that the plaintiff was in adverse possession, claiming the whole lot; that the defendant Richardson also claimed the whole lot under a deed from Sheafe, and that he, with the other defendants as his servants, entered upon said lot under his said claim, and cut and carried away the timber from all of said lot.

The only question discussed at the bar was, whether the plaintiff was entitled to maintain this form of action for said acts of the defendants.

In the case of *Booth v. Adams*, 11 Vt. 156 [34 Am. Dec. 680], it was held, in the language of the reported opinion, that "one tenant in common of land cannot maintain trespass against his co-tenant, unless he is expelled from the common estate, or deprived of the common enjoyment."

That seems to have been an action of trespass *de bonis*. The decision of that case upon its facts, irrespective of the peculiar form of expression in which it was announced, would seem to be a conclusive authority against the plaintiff in the present case; for if trespass *de bonis* would not lie, *a fortiori* trespass *quare clausum* would not.

It is undoubtedly true that the language of the decision above cited, and the remarks of the judge in the discussion of the subject, had exclusive reference to the action then under consideration, both in its form and substance; yet as that language is general, and does not expressly restrict itself to that form of the action of trespass, the urgency with which the learned counsel pressed upon the court the right of the plaintiff to maintain this action has led us to suspect that they regard the language of that decision, and the remarks of the judge in drawing up the opinion, as designed to indicate that the action of trespass *quare clausum* may be brought by one tenant in common against his co-tenant as well as trespass *de bonis*. The cases cited by the plaintiff's counsel to show that trespass or ejectment might lie in favor of a tenant in common against his co-tenant do not sustain that proposition.

Not one of them was trespass *quare clausum*, but all were ejectment or writ of entry. The language of Judge Williams in *Kirby v. Mayo*, 13 Vt. 103, is cited. He announced in general terms a very old and well-established doctrine, that "the possession of a tenant in common, as well as that of a tenant at will, may become adverse, so that his co-tenant or the land-

lord may treat him as a trespasser, and maintain an action against him as such." And in consequence of such adverse possession by the defendant in that case, the court held that the plaintiff had lost his right in common to the property in question. We think it clear that the learned judge did not intend, by using the term "trespasser," to convey the idea that the party might be pursued by a technical action of trespass; and that he did not so mean in saying that an action might be maintained against him as such trespasser. In our opinion, all that he meant was, that a tenant in common might be transcending his right as such tenant by the character of the possession he was holding, and therein, in the generic and untechnical sense of the term, be trespassing upon the right of his co-tenant; as would be true in the case of an ouster. In such case, the party whose right was thus trespassed upon might maintain an action against his co-tenant on account of such transcending of legal right. But we think it was not designed to indicate the form of action which would be proper, under the rules of the law, in such case.

We have taken occasion to examine all the cases cited, and also to look into some of the older as well as some of the more modern books. In Co. Lit., sec. 322, it is said: "If two have an estate in common for term of years, etc., and one occupy all and put the other out of possession and occupation, he which is put out of occupation shall have against the other a writ of *ejectiones firmæ* of the moiety," etc. Section 323: "In the same manner it is, when two hold the ownership of the lands or tenements during the nonage of an infant, if the one oust the other of his possession, he which is ousted shall have a writ of ejectionment *de garde*, etc., . . . but no action of trespass (*videlicet*) *quare clausum suum fregit*, etc., for that each of them may enter and occupy in common, etc., *per my et per tout*, the land and tenements which they hold in common." In *Haywood v. Davies*, 1 Salk. 4, it was agreed that in trespass the defendant cannot plead in abatement that he is tenant in common with the plaintiff, because he may give it in evidence, and that will prove him not guilty.

In Sel. N. P. 1347, it is said that one tenant in common cannot bring an action of trespass against his co-tenant, because each of them may enter and occupy, etc., *per my et per tout*, the lands and tenements which they hold in common. In *Cubitt v. Porter*, 8 Barn. & Cress. 257, Littledale, J., says: "If there has been an actual ouster by one tenant in common,

ejectment will lie at the suit of the other. But I am not aware that trespass will lie, for in trespass the breaking and entering is the gist of the action; expulsion or ouster is mere aggravation of the trespass. If the original entry, therefore, be lawful, trespass will not lie." That was trespass *quare clausum*, by one tenant in common against another, for pulling down a partition wall that was property in common. In *Cutting v. Rockwood*, 2 Pick. 443, which was trespass *quare clausum*, Wilde, J., says: "It is a sufficient justification for the defendant that he and those under whom he holds had an estate in common with the plaintiffs."

It was decided in *Goodtitle v. Tombs*, 3 Wils. 118, that after a recovery in ejectment by a tenant in common against his co-tenant, an action of trespass for the mesne profits would lie between the same parties. So far as I have examined, that seems to be the first case of the kind that the books show to have been maintained for mesne profits. It is regarded as an exception to the established rule, and seems designed, in connection with the modern action of ejectment in England (in which the term only and nominal damages can be recovered), to supply the place and office of the old ejectment at common law, in which mesne profits were recoverable by way of damage. In this action of trespass for mesne profits, the prior recovery in ejectment is conclusive in favor of the plaintiff, of his right to recover such damage as he can show by having been kept out of the common property, including the mesne profits. It is obvious that this all proceeds upon a ground and gist of action very different from a trespass by breaking and entering the plaintiff's close. It seems to be adopted by the courts, as a kind of necessary complement to the modern ejectment in England, necessary in order to afford the plaintiff, recovering in ejectment, adequate means of remedy for the invasion of his rights, as established by the judgment in ejectment.

The mere entry upon the common land by one of the tenants, and cutting and carrying off the timber therefrom, is nowhere treated as giving to the other tenant the right to maintain an action of trespass of any kind, and least of all could it give the right to maintain trespass *qu. cl.* Superadd the fact which is shown in this case, that the plaintiff herself was all the while in possession of the property, claiming to hold it adversely to the defendant, in exclusive ownership, and the entire lack of ground for maintaining this action, either

upon principle or precedent, is very palpable: See 1 Swift's Dig. 514.

The manner in which the subject of trespass to real property is presented in Hammond's N. P. 151 (a book remarkable for philosophical and logical method in propounding and developing legal principles), makes palpable the paradox involved in the idea of the right of a tenant in common to maintain trespass *qu. cl.* against his co-tenant. "In every case where one man has a right to exclude another from his real, immovable property, the law encircles his estate, if it be not already inclosed, with an imaginary fence, etc., . . . and entitles him to a compensation in damages for the injury he sustains by the act of another passing through the boundary, denominating the injurious act a breach of the inclosure." It is fundamental in the law of the subject that one tenant in common has no right to exclude the other from the common property. Hence any inclosure of it, whether by the imaginary fence that the law constructs, or by a real one constructed by the hands of men, defines no right in exclusion of, and constitutes no barrier against, either of the common tenants; and of course, the passing through such boundary by either of them would be no breach of the inclosure, and could give no right of action in trespass *quare clausum fregit*.

It is needless to pursue the discussion further. As before remarked, the case cited, *Booth v. Adams*, 11 Vt. 156 [84 Am. Dec. 680], seems to us to be a conclusive authority against this action, as it stands upon the agreed statement of facts. With that decision upon the point then under judgment, we are well satisfied.

Judgment affirmed.

ACTIONS BY ONE TENANT IN COMMON AGAINST ANOTHER: See *Pico v. Columbet*, 73 Am. Dec. 550, note 555, where other cases are collected.

ONE TENANT IN COMMON, WHO HAS BEEN OUSTED BY HIS CO-TENANT, may maintain ejectment: *Hutchinson v. Chase*, 63 Am. Dec. 645, note 650, where other cases are collected. And a tenant in common, who is excluded by his co-tenant from the whole of the premises, may maintain trespass *quare clausum fregit*: *Silloway v. Brown*, 12 Allen, 33, where the court refer to the principal case, but decline to follow it.

McAULAY v. WESTERN VERMONT R. R. Co.

[33 VERMONT, 511.]

DECLARATIONS OF PERSON TENDING TO SHOW THAT HE HAD KNOWLEDGE OF CERTAIN FACT are admissible in evidence for the purpose of proving that he had such knowledge when he made them.

PAYMENT OR DEPOSIT OF LAND DAMAGES IS CONDITION PRECEDENT to the vesting of title in a railroad company to lands taken for their road, or of any right in them to construct their road, and if they proceed in such construction without such payment or deposit, they are trespassers. But the owner of the land may waive this condition even by parol.

OWNER OF LAND TAKEN FOR RAILROAD CANNOT MAINTAIN TRESPASS OR EJECTMENT therefor after the road is constructed and put in operation, upon his failure to obtain payment of his land damages, where he has acquiesced in the occupation of the land for the construction of the road without prepayment of such damages under an agreement for the future payment thereof by the company.

NOTICE TO LABORERS EMPLOYED BY CONTRACTOR ENGAGED IN CONSTRUCTING RAILROAD, given by the owner of the land taken for the road, forbidding their working on the road until his damages were paid, is not sufficient to enable him to maintain ejectment for the land taken after the road has been built and put in operation, especially where he gives such notice on one occasion only, and for many years takes no effectual steps to stop the proceedings of the company or to enforce such payment.

EJECTMENT. Plea, the general issue. On the trial, it was admitted that the premises described in the declaration originally belonged to the plaintiff, and that they were taken by the Western Vermont Railroad Company in 1850, for the purposes of their road, the construction of which was completed in 1851. The parties disagreeing as to the price of the land, the defendants procured the damages to be appraised by commissioners as prescribed by law. This appraisal was made on the fourth of September, 1851; on the fourteenth of October following, the plaintiff appealed from the award of the commissioners, and on the twenty-fourth of May, 1853, a reappraisal took place, by which the sum of two thousand and fifty dollars was awarded to the plaintiff for his damages; this award was confirmed by the court in December, 1854. And it was also admitted that the land had been used for the purposes of a railroad track up to the time of the trial. The plaintiff introduced evidence tending to show that he had never been paid the damages awarded to him, and rested his case. The defendants gave in evidence a written contract signed by the plaintiff, in which he agreed to accept stock of the company in payment of his land damages. They also gave evidence tending to show that they had been ready and willing to give the plain-

tiff the stock, but that he refused to accept or receive the same. The plaintiff claimed that the contract given in evidence by the defendants was obtained by fraudulent representations and concealment in regard to the location of the road, made by Martin C. Deming, who, during the survey and construction of the Western Vermont railroad, was a director of the company residing in the vicinity of the premises. He also offered in evidence the testimony of one Lathrop to show certain declarations of said Deming, the substance of which is stated in the opinion. The defendants objected to the admission of these declarations, but the court admitted them. There was no evidence that the plaintiff ever interposed in any way to prevent the occupation of the land for the purposes of the road, otherwise than by forbidding the hands employed on the road, as stated in the opinion. Other facts appear from the opinion.

Edward J. Phelps, for the defendants.

A. L. Miner and A. B. Gardner, for the plaintiff.

By Court, REDFIELD, C. J. The commencement of the construction of the defendants' road was before damages were appraised, which was on the fourth of September, 1851. The location and survey of the road was, of course, before work began, and so is the date of the writing signed by the plaintiff. But it was not, in fact, signed by the plaintiff until about the time of the first appraisal. The construction of the road was completed in 1851, and it immediately went into operation and has so continued until the present time.

The first question which arose in the trial of the action was in relation to the declarations of Martin C. Deming, a director of the company, as to his knowledge of the claim of the plaintiff, that the road should be located in a particular place, or else that he would not take stock for his land damages, and that it had not been so located, and his consequent expectation that he would not accept the stock, the declarations being before the alleged fraud and deception practiced by said Deming in inducing the plaintiff, as he claims, to sign the agreement to accept stock. We do not regard these declarations as mere admissions of the agent of the company. They are facts in themselves, that is, knowledge of the location of the road, and that it was in a place where the plaintiff did not desire it, and that if its location there was known to him, he would not accept the stock of the company for damages. If, instead of these admissions or declarations, it had been shown

that some person gave Deming notice of these facts near the time of his alleged fraud practiced upon the plaintiff, there could be no question of the importance and competency of the evidence. But the real inquiry is, whether the fact that, at the time he induced the plaintiff to sign the agreement he knew that the road was located where the plaintiff did not desire it, and represented to the plaintiff that it was laid in another place, and where he did desire it, in order to obtain the plaintiff's signature to the agreement, is competent to go to the jury. The most satisfactory evidence of such knowledge is his own declaration to that effect. Some one might have informed Deming of this fact, and he not understand them, or he might possibly understand them precisely contrary to the fact. But there is no possibility that he would state a fact of which he had no knowledge.

2. It being admitted, as it seems to be, that the plaintiff had full knowledge of the proceedings of the company to locate and construct their road upon his land, before and during all the time of the construction, and that he did not interfere in any way to prevent the occupation of the land for the purposes of the road, otherwise than by forbidding the hands working on the road until his damages were paid, and that on a single occasion, it becomes an important inquiry whether he can now maintain ejectment for the land by reason of the non-payment of his damages. This is certainly a question of some practical importance, but does not appear to have been distinctly submitted, in any form, to the jury, although the requests of the defendants' counsel sufficiently point towards the question.

There can be no doubt, upon the state of facts detailed in the case, that the jury must have come to the conclusion that the plaintiff made no objection to having the road constructed where it was located, except to the workmen upon a single occasion. This is not sufficient objection, for two reasons: 1. It was not made in the proper quarter to the proper agents of the company. These workmen were in no sense either the agents or the servants of the company; they were the mere servants of the contractor. And in addition to this, being upon a single occasion, it is quite susceptible of the construction that upon all other occasions the plaintiff not only made no remonstrances, but that he virtually assented to the construction and operation of the road. The fact that no effectual steps were taken, either to stop the proceedings of the company or enforce the payment of land damages, for a great number of

years, and even for a considerable period after the final assessment, confirms this view. Under this state of facts, the question arises, Can the plaintiff maintain ejectment until his land damages are paid, or the company have acquired title by the statute of limitations? This seems to have been the view of the plaintiff in bringing the action, and it seems to have been viewed much in the same light at the trial. But we are unable to adopt this conclusion.

It is undoubtedly true that, according to our general railroad statutes and the special charters in this state, the payment or deposit of the amount of the land damages, assessed or agreed, is a condition precedent to the vesting of the title, or of any right in the company to construct their road, and that if they proceed in such construction without this, they are trespassers, and this has been repeatedly so held by this court.

This may have led to the misapprehension in the present case. But it is certainly a very serious misapprehension. In these great public works, the shortest period of clear acquiescence, so as fairly to lead the company to infer that the party intends to waive his claim for present payment, will be held to conclude the right to assert the claim in any such form as to stop the company in the progress of their works, and especially to stop the running of the road after it has been put in operation, whereby the public acquire important interests in its continuance. The party does not, of course, lose his claim or the right to enforce it in all proper modes. He may possibly have some rights analogous to the vendor's lien in England, and here, until the legislature cut it off. But it is certain, according to the English decisions, that he cannot stop the works, and especially the trains upon the road, if he has, in any sense, for the shortest period, clearly given the company, either by his express assent or by his silence, to understand that he did not intend to object to their proceeding with their construction and operation.

And laying the written agreement wholly out of the case, there is a good deal in the case which looks as if the company were fairly justified in supposing the plaintiff did not object, and was therefore willing that they should go forward in the construction of their road, if they would only agree to pay him the money for his land damages. He does not seem to have insisted that the first appraisal should be deposited during the pendency of the appeal, and before the work proceeded further. His great desire seems to have been that the

damages should be agreed upon, and that he should be released from all claim under the written agreement to accept stock. To this extent, his remonstrances were loud and sufficiently intelligible. And if it should appear that he also made himself well understood by the company, or their proper agents, acting on their behalf in these matters at the time, in regard to insisting upon the payment or deposit of his land damages, according to the statute and before the works proceeded, and that the company understood at the time that they were proceeding in defiance of his remonstrances, and upon their own responsibility merely from first to last, it is certainly not necessary to assert here that they are not liable now in trespass and ejectment. The English courts, certainly those of equity, do not give much countenance to the idea of stopping the operation of a railway for any mere informality in the organization of the company, or in the construction of their road, or in taking land. Lord Cottenham, chancellor, says, in *Duke of Leeds v. Earl of Amherst*, 2 Phill. Ch. 117, 123: "If a party, having a right, stands by and sees another dealing with the property in a manner inconsistent with that right, and makes no objection while the act is in progress, he cannot afterwards complain."

In the present case, it is not precisely a parol license under which the company claim to have built the road. Their record title to the land would be complete, with the addition of the fact of payment, or the deposit of the amount of the appraisal. That is a fact resting always *in pais*. And being so, although a condition precedent, it may be waived by the party in whose favor it exists, and this by parol merely. The waiver may be by parol as well as the performance. And the waiver may be partial as well as total. If there was then a waiver in fact, either express or implied, by acquiescence in the proceedings of the company, to the extent of not insisting upon prepayment as a condition precedent, but consenting to let the damages be and remain a mere debt, with or without a lien upon the road-bed, as the law may turn out to be, then it is impossible to regard the defendants, in any sense, in the light of trespassers, or liable in ejectment. One might as well expect to assert a mechanic's lien upon railway structures, which cannot be done. In *Dunn v. North Missouri R. R.*, 24 Mo. 493, it is decided that such lien cannot exist, both on account of the nature of the works and the public interest in them: *Redfield on Railways*, 231, 510.

Judgment reversed, and case remanded.

PAYMENT FOR LAND TAKEN FOR PUBLIC USE IS CONDITION PRECEDENT TO TAKING: See *Bensley v. Mountain Lake Water Co.*, 73 Am. Dec. 575, note 583, where other cases are collected. A railroad company has no right to take and retain a man's land for the use of its road without paying for it: *Dayton etc. R. R. Co. v. Lexington*, 20 Ohio St. 414, citing the principal case.

WEBSTER v. HILDRETH AND WIFE.

[33 VERMONT, 457.]

HUSBAND, BY IMPROVING HIS WIFE'S LAND WITHOUT ANY AGREEMENT WITH HER, through trustees or otherwise, that his labor and money expended thereon should vest in him any interest therein, or entitle him to any claim against or compensation from her property, gains no right or title to her land which his creditors can reach by attachment, or by the aid of a court of equity.

BILL in chancery. The opinion states the case.

Cooper and Bartlett, for the orator.

Edwards and Stewart, for the defendants.

By Court, ALDIS, J. In 1844, Thomas Fisk deeded to his daughter Lucinda, the wife of Nathaniel Hildreth, a wild lot of land in Charleston. Hildreth and wife (the defendants) moved on to the lot, and have since lived on it; have, with the help of their children, cleared up a large part of it, erected buildings, and made valuable improvements. The lot was originally worth about two or three hundred dollars, and is now valued at twelve or fifteen hundred dollars, the increased value being in part from the rise of the land in price, and part in the improvements.

Hildreth, the husband, has by his labor and money contributed to the improvements. But during the whole time, the title to the land has always been in the wife—it so appearing of record, and being so generally known.

The orator, having a debt against the husband, sued it, obtained judgment, and levied the execution on seven undivided twelfth parts of the farm so belonging at law to the wife, claiming that the husband's labor, earnings, and money have contributed to the improvements and made up eight twelfths of its present value, and that he has thereby an undivided equitable interest to that extend in the farm.

This bill is brought to confirm the title of the orator to the undivided interest he has levied upon, and to obtain a partition of the land between him and the wife, in proportion to their alleged interests.

The bill states that the husband has invested his money and property in his wife's farm with the intent to defraud his creditors. But we do not find any such intent or fact proved, and it is wholly denied in the answers. The answers allege that the husband has, with his wife and four minor sons, lived on the farm and cleared and improved it in order to get a living, and promote the comfort and welfare of the family. No agreement is alleged to have existed in any form between the husband and wife, through trustees or otherwise, that his labor and improvement of the farm should vest in him any interest in the farm, or entitle him to any claim against or compensation from her property. Without such an agreement in some legal form, we do not perceive how he could get any equitable claim upon the farm. He would be but a volunteer, knowingly contributing to the improvement of his wife's estate, and without any expectation of compensation. The wife could not prevent him from doing such voluntary service for her benefit. Clearly he has no right, legal or equitable, to claim compensation for services so rendered. If so, deeds and settlements for the separate use of the wife would be of but little avail, and husbands would have the power to improve their wives out of their estates.

Nor can the creditor have any greater right against the wife's estate than the husband has. No fraud was practiced on him. He was not induced to give the husband a false credit, for he knew the land belonged to the wife. Morally, the husband may have acted wrong, in the eyes of creditors, in bestowing his labor upon the improvement of his wife's land, rather than in the acquisition of property which could be attached. But for this preference of themselves to their creditors, the law has still left many opportunities for debtors, and equity has no jurisdiction to appropriate to the benefit of creditors property which the law has not made attachable; or to compel men to work for their creditors who may perversely prefer to work for the benefit of their wives and children, and leave honest debts unpaid: *Pierce v. Pierce*, 25 Vt. 511.

In *White v. Hildreth*, 32 Vt. 265, in Orleans county, we held that the rents and profits of this land could not be attached by a creditor through the trustee process against one to whom the farm was leased. It would seem absurd to hold that the land itself could be taken by creditors of the husband, while its rents and profits could not.

The right of a tenant or claimant of land to betterments has

no analogy to this case. The claim to betterments exists only where they were made by one supposing at the time he made them that he had a good title. Mere volunteers, who know they have no title, have no such right.

In another view, the orator's bill is untenable. The husband, even if he had an equitable interest or claim as against the wife, had no attachable interest. But it is superfluous to pursue his view of the subject.

The whole proceeding by the creditor has no legal basis to rest upon as against the wife's rights.

The decree dismissing the bill is affirmed.

CREDITOR OF HUSBAND CANNOT SUBJECT TO HIS DEMAND IMPROVEMENTS ON WIFE'S LANDS made by him without any participation by her in any intentional wrong: See *Robinson v. Huffman*, 61 Am. Dec. 177, note 179; *Burleigh v. Coffin*, 53 Id. 236. Where the legal title to property is in the wife, as against her husband, it cannot be seized to satisfy his debts without proof that in the given case her title is merely colorable and fraudulent as against his creditors: *Voorhees v. Bonesteel*, 16 Wall. 32, citing the principal case. A husband has a right to work on his wife's land, and thereby increase its value, and such increase cannot be reached by his creditors, either at law or in equity: *Premo v. Hewitt*, 55 Vt. 367; *Moore v. Lampton*, 80 Ind. 304, both citing the principal case.

WHEN WIFE'S PROPERTY SUBJECT TO EXECUTION FOR HUSBAND'S DEBTS: See *McKinnon v. McDonald*, 72 Am. Dec. 574, note 577, where other cases are collected.

CASES
IN THE
SUPREME COURT OF APPEALS
OF
VIRGINIA.

EVANS v. PEARCE.

[15 GRATTAN, 612.]

FATHER, IF OF ANILITY, IS BOUND TO MAINTAIN HIS INFANT CHILDREN, even though they may have property of their own. The court will, however, authorize the income arising from the estates of the infants to be applied to their support, whenever, under all the circumstances, it appears to be proper.

WHERE FATHER, HAVING IN HIS POSSESSION PROPERTY OF HIS INFANT CHILDREN, makes no application to the court during his life-time to have the income of such property appropriated to their support, and makes no charge against them for their support or education, his estate, after his death, will not be allowed anything for their support without the clearest proof that justice requires it. In such a case, the father will be treated as a guardian, and his accounts will be settled on the principles applicable to guardians' accounts.

BILL filed by the administrator and some of the children of William Evans, deceased, against his widow and other children, for a settlement and distribution of his estate. The widow, thinking that the administrator did not attend to the interests of the estate, took upon herself its defense. The only matters of controversy related to the profits of certain property belonging to two of the children of said Evans, derived from their grandmother, which was in his possession and managed by him. Evans had been married three times. The mother of the second wife left by her will certain real estate and slaves to her daughter for life, and after her death to her children. This property went into the possession of Evans during the life-time of his wife, and after her death he continued to hold it, and rented out the houses, and seems to have generally

hired out the slaves. The commissioner, to whom the accounts were referred, made his report, settling the account on the principle applicable to guardians' accounts. He ascertained the amount due from Evans for the rent of the houses to be one thousand one hundred and seventy-seven dollars and forty-three cents, and for the hire of the slaves six thousand two hundred and eighty-two dollars and sixty cents, a part of this latter sum being for hires and interest thereon, the actual amount for which the slaves were hired not being proved but estimated by the witness. Mrs. Evans excepted to the report, because: 1. Nothing was allowed to Evans for the maintenance and education of said infant children; 2. He was charged with interest on the profits of their estate whilst they were living with him; 3. He was charged with interest on conjectural hires. The court overruled the exceptions, and gave a decree against the estate of Evans for two thirds of the amount reported, the other third belonging to him as the heir and distributee of the child who had died. Mrs. Evans appealed.

August and Randolph, for the appellant.

Steger, for the appellees.

By Court, ROBERTSON, J. The father, in this case, rendered himself responsible as the guardian *de facto* of two of his infant children, by retaining in his possession the lands and slaves to which they became entitled on the death of their mother, and receiving the rents and hires. His accounts as such guardian have been settled in a suit brought after his death by his administrator. Exceptions have been taken to this settlement by his widow, who has taken upon herself the defense of the estate, because, as she alleges, the administrator has failed to protect it as he ought to have done from the claims asserted against it.

The objection to the compounding of interest, and to the charge of interest upon conjectural rents and hires, cannot be sustained. The charges of interest are in conformity with the rule which has been established for the settlement of the accounts of guardians; and one who makes himself guardian *de facto* is certainly not entitled to be treated with more favor than if he had been legally appointed.

The only question in the case about which there can be any doubt is, whether the estate should be allowed credit for the support and education of the children out of the income of their property.

A father, if of ability, is bound to maintain his infant children, even though they may have property of their own.

The court, however, will look with liberality to the circumstances of each particular case, and to the respective estates of father and children, and will authorize the income arising from the estates of infants to be applied to their support, whenever, under all the circumstances, it appears to be proper. But when the application to allow the income so to be appropriated is not made, as it ought to be, in advance, and is delayed, as it has been in this case, until after the guardianship has terminated, the court will not permit it without the clearest proof that justice requires it.

Such proof is not furnished in this case. One of the infants was kept at work as an apprentice at the trade of his father for several years; during which period his services must, at the least, have been worth his support. It is not alleged that the father was at any extraordinary expense for the support or education of either of these children; and there is nothing in the case from which it can be inferred that he did not consider himself of sufficient ability to support and educate them in the same way that he did his other children, or that he designed to put them on a different footing in this respect. It is very possible that he was not fully aware of the extent of his responsibility as their guardian. He must have known, however, that he was liable to them to some extent, yet there is not the slightest indication of any intention to offset this liability, or to make a charge against them in any form for their support or education. The fact that no such charge was intended would not, it is true, be conclusive against its allowance, if it appears to be proper; but it is a strong circumstance to show that it is not proper; that he not only considered himself to be, but really was, of ability to maintain his children out of his own means, and that he did so maintain them.

If any other person had acted as their guardian, it would hardly be contended that the income of their property in the hands of such guardian could now be subjected to reimburse to his estate the expenses incurred by him in maintaining them; and I cannot see how the fact that he was himself both father and guardian could give him any right to use their income that he would not have possessed if the guardianship had been in other hands.

The objection to the charge of interest against the guardian while his wards lived with and were supported by him, rests

substantially on the same ground with the claim to charge for their support out of the income of their estate; for the interest is part of their income.

I am of opinion to affirm the decree.

DANIEL and MONCURE, JJ., concurred in the opinion of ROBERTSON, J.

Decree affirmed.

DUTY OF FATHER TO MAINTAIN HIS MINOR CHILDREN: See *Gill v. Read*, 73 Am. Dec. 73, note 77, where other cases are collected. A father, if of ability, is bound to maintain his infant children, even though they may have property of their own: *Griffith v. Bird*, 22 Gratt. 80; *Stigler v. Stigler*, 77 Va. 171, both citing the principal case.

LIABILITY OF GUARDIAN WHO EXPENDS MORE THAN INCOME OF WARD'S ESTATE: See *Phillips v. Davis*, 62 Am. Dec. 472, note 474. In no case will an allowance be made to a guardian for the maintenance of his ward after the guardianship has terminated, without the clearest proof that justice requires it: *Stigler v. Stigler*, 77 Va. 171, citing the principal case.

THE PRINCIPAL CASE IS DISTINGUISHED in *Hanser v. King*, 76 Va. 737.

BENNETT v. TOLER.

[15 GRATTAN, 568.]

ILLEGITIMATE SON OF WOMAN TAKES EQUALLY WITH HER LEGITIMATE CHILDREN under a devise from her father to her for life, and at her death the property to be equally divided among her children.

APPEAL from the decree of the circuit court of Pittsylvania, in a suit instituted by the children of Henry Toler, deceased, against Crafton Bennett and others. Henry Toler, the father of the plaintiffs, was the illegitimate child of Mary Bennett, mentioned in the opinion. The court below decreed in favor of the plaintiffs, and the defendants appealed. The other facts are stated in the opinion.

Read, and Macfarland and Roberts, for the appellants.

Grattan, for the appellees.

By Court, ALLEN, P. This case arises upon the sixth clause of the will of Joseph Toler, deceased. By that clause, he gave to his daughter Mary Bennett the land on which she then lived, and certain slaves; and the clause concluded with these words: "My will is, at the death of my daughter Mary Bennett, that the land and negroes given to her shall be equally divided amongst her children." At the testator's death, his

daughter was married to Lewis Bennett, by whom she had several legitimate children. Previous to her marriage, she had an illegitimate child by another man. The will bears date the tenth of July, 1818, and was admitted to probate the fifteenth of November, 1819. At the death of the testator, the legitimate children and the bastard son were all living. And the only question is, whether the illegitimate child took a vested interest, equally with the lawful children of Mary Bennett, under this clause of their grandfather's will. It is said in 2 Jarman on Wills, 2 Perkins's Am. ed., 94, "to be an established rule, that a gift to children, sons, daughters, or issue, imports *prima facie* legitimate children or issue, excluding those who are illegitimate, agreeable to the rule, *Qui ex damnato coitu nascuntur, inter liberos non computantur.*" We have thus the rule that such a gift imports, not absolutely but *prima facie* legitimate children; and we have the ground on which it rests in the Latin maxim. The bastard is not computed amongst children. "We term them all by the name of bastards that be born out of lawful marriage:" 1 Thomas's Co. Inst. 115. "A bastard is in law *quasi nullius filius*, because he cannot be heir to any:" Lit., sec. 188. If possessed of personal estate, he dies intestate and without wife or children, the estate belonged to the crown; if of real estate, it escheated. For he was supposed to have no relations, no heirs or next of kin, except those arising from his own contract of marriage, his wife and children, or descendants.

In this state of the law, when the courts came to determine what was the import of the words "children," etc., of necessity the word was construed to mean such as the law recognized as children. It was the obvious course to hold that where a testator was in the act of making a disposition of his estate, which the law permitted, and used a word which, by law, comprehended one class, he could not be supposed to intend a party who the law declared did not belong to the class named; to intend a person who in law was *quasi nullius filius*, without relations, heirs, or next of kin, except his own wife and progeny. There was still another reason which would preclude the court from giving such an enlarged meaning to the words "children," etc., when applied to the children or issue of a man. How was the fact of paternity to be ascertained, except by going into an inquiry which the court could scarcely enter into upon the construction of a will. The birth of a child during a lawful marriage is *prima facie* evidence of its legitimacy. For-

merly so strict was the rule, that if the husband be within the four seas, no proof was admitted to prove the child a bastard, unless in case of apparent impossibility of procreation; though the strictness of this rule has long since been relaxed, and the presumption of legitimacy arising from birth in wedlock may be rebutted by circumstances inducing a contrary presumption, as proof of non-access, etc.: Thomas's Co. Inst. 109, note b. But the presumption exists until rebutted; and therefore, by the use of the words "children," etc., in a devise or bequest, the testator must be understood to mean those who are by law presumed to be his children. But no such presumption can arise in respect to his illegitimate children. They still continue *nullius filius* as to the father. There must be some recognition; something to show that in the particular instance he did intend to describe the illegitimate child; and this intention must be arrived at by some description which will serve to designate the individual, and not by naming a class which in law is not presumed to comprehend one of his condition. In the construction of wills in reference to this as to other subjects, the intention of the testator controls. The law contains no restriction upon the power of a testator to devise or bequeath to a illegitimate child. If it appears that the testator intended to make such a devise, effect must be given to the disposition.

It is said by Jarman, p. 94, that "illegitimate children, born at the time of making the will, may be the objects of a devise or bequest by any description which will identify them. Hence, in the case of a gift to the natural child of a man or of a woman, or of one by the other, it is simply necessary to prove that the objects in question had, at the date of the will, acquired the reputation of being such children." In the same connection, this author reviews the most prominent cases which have been decided on this question; and it is observable that in most, if not all, the cases cited and commented on by him (except the case of *Mortimer v. West*, 3 Russ. 370; S. C., 3 Eng. Ch. 370), were devises or bequests to the illegitimate children of the father, or of a woman by a certain individual. The case last mentioned seems to have been the first in which it was held that a devise to the children of a woman, without reference to the father, was bad; and the only subsequent case to which we have been referred of like import is *Dover v. Alexander*, 2 Hare, 275, S. C., 24 Eng. Ch. 275, which arose on the construction of a deed.

But though one of the incidents, the uncertainty in regard

to paternity, does not exist in case of a devise to the children of a woman, without reference to the father, yet the decision was the logical sequence of the first proposition, that by law the natural child is *filius nullius*, has no relation, and cannot inherit from or transmit inheritance to the mother. In legal language, he is not comprehended in the class of her children; and therefore, as in the case of the putative father, the court could not say he was comprehended in that class by the use of the term. Whether, upon a question of intention, this was not straining the rule to an unreasonable extent, is another question. The principle is the same in both cases. In contemplation of law, they were not children; and the use of the word "children" was not sufficient to embrace them.

Some of the cases, as *Wilkinson v. Adam*, 1 Ves. & B. 422, *Harris v. Lloyd*, Turn. & R. 810, S. C., 12 Eng. Ch. 810, decide that the face of the will alone can be looked to for the purpose of ascertaining the intention to apply to natural children. But this rule has been innovated upon by other cases; as, *Beachcroft v. Beachcroft*, 1 Madd. 430; *Fraser v. Pigott*, 1 Younge, 354. But none of the cases interfere with the general rule that illegitimate children may take if clearly designated by a description which identifies them.

Coke, as we have seen, terms all by the name of bastards that be born out of lawful marriage. Subsequent marriage and recognition do not legitimate; children of marriages within the prohibited degrees; of marriages not properly solemnized in proper place or by proper license or banns; of a marriage where there was a former marriage, or where the parties were imbecile—are bastards; and therefore *inter liberos non computantur*: Shelford on Marriage and Divorce, c. 3, pp. 154–157, 171–178, 179, 183, 185, 186, 190; Roper on Husband and Wife, 486. They have no heritable blood, and are not comprehended in the class of children when that word is used in a will, where there are, or by possibility may be, legitimate children to answer to the description. As where legitimate children were or might have been entitled under a bequest, this possibility excludes the illegitimate. Because "children" in its primary sense, we have seen, if unexplained, imports legitimate children only.

In Virginia, a child born before marriage, born a bastard, if the parents afterwards marry, and he is recognized by the father, is legitimate. So the issues of marriages deemed null in law are legitimate: Code, 523; or if a woman by a second marriage which took place during the life-time of the first

husband. It would not be seriously maintained that, under this legislation, persons in this condition would not, in this state, be comprehended by the word "children." In England, as we have seen, they would not be, if there were legitimate children or the possibility of there being such children. Yet both in England and Virginia, the intention of the testator controls in the construction of wills. And guided by this rule, the courts there hold such children not to be intended; here, that they are. And both are correct; for where words are used which in law have received a legal signification, the party is presumed to use them in that sense, unless the contrary appears. In England, they are not computed as children, for not being born in lawful wedlock, the law does not presume them *prima facie* to be children. In Virginia, being recognized after marriage, or being the issue of a marriage, though unlawful, the law *prima facie* presumes them to be children, declares them to be legitimate, and therefore necessarily computed as children whenever the word is used. To include them in England, there must be something amounting to an express *designatio personarum* applicable to them; in Virginia, to exclude them from the class in which the law here comprehends them, there must be something to show clearly that such was the intention.

This brings us to the inquiry as to the condition of children in Virginia not born in wedlock or recognized by the father after marriage. On the paternal side, their condition is unchanged. As to him, the bastard is still *quasi nullius filius*; the law indulges no presumption as to his paternity. If acknowledged by the father, that is a fact to be proved, not a presumption of law. A devise or bequest to him by his reputed or acquired name is good, whether made by his father or a stranger; a bequest to children, if there be legitimate children, does not comprehend him, because there is no legal presumption that he is a child.

But how is it *ex parte materna*? as to her, does he, as in England, remain *quasi nullius filius*—without relation, without next of kin, except his own wife and progeny? Or does the law recognize him as her child—embrace him in the description of her children? The solution of these questions is to be found in our statute of descents, as construed by this court.

The code, c. 123, sec. 5, p. 522 (1 Rev. Code, 355, secs. 2, 18), provides that where any person having title to real estate of inheritance shall die intestate as to such estate, it shall de-

second and pass in parcenary to such of his kindred, male and female, as are not aliens, in the following course: 1. To his children and their descendants. And further: "Bastards shall be capable of inheriting and transmitting inheritance on the part of their mother, as if lawfully begotten." The framers of this act, we are told by Carr, J., in *Davis v. Rowe*, 6 Rand. 364, "looked at the common-law canons of descent to avoid, not to imitate; to pull down, not to build up. All its principles are violated, its landmarks removed, its fences broken down, its traces obliterated." "Its basis," says Judge Parker, in *Garland v. Harrison*, 8 Leigh, 368, referring for his positions to the opinions of judges Tucker and Roane in *Stones v. Keeling*, 5 Call, 143, 147, 148, "was the statute of distributions and the civil law. It is founded on the great principles of justice. Its object was to make such a will for the intestate as he would himself probably make; and its obvious policy was to follow the lead of the natural affections, and to consider as most worthy the claims of those who stand nearest to the affections of the last occupant. It ought, therefore, at all times to be liberally construed in favor of those to whom the intestate himself, had he made a will, might be supposed to be most favorable, without reference to common-law rules or feudal disabilities."

Under the influence of these principles, the judges in *Garland v. Harrison*, *supra*, proceeded to the construction of the provision of the act of descents, declaring that bastards shall be capable of inheriting and transmitting inheritance on the part of their mother, as if lawfully begotten; and the result can be best arrived at by quoting their own expressions. After enumerating his common-law disabilities, Judge Parker says: "It was the object of the law to give the bastard a mother, and to place him in all respects on the same footing as a lawfully begotten child, born of the same mother." Again, after commenting on section 6 (Code, c. 123), and section 19 (1 Rev. Code p. 357), declaring that a child born before marriage and the parents intermarry, if recognized by the father, shall be deemed legitimate, he says: "I have no doubt that it was intended, by the section respecting bastards, to bestow upon illegitimate children the same capacities of inheriting from or through the mother, and passing inheritances to or through her, as they possess under the other section in respect to both parents; that is to say, to make them in all respects the legitimate children of their mother." And again: "These relaxa-

tions of the severity of the common law rest upon the principle that the relation of parent and child, which exists in this unhappy case, in all its binding and native force, ought to produce the ordinary consequences of consanguinity; and I am convinced that it was the intention of the legislature of Virginia to adopt the most liberal rule in respect to an inheritance in case of bastardy, that was consistent with the certain ascertainment of the parents." So Judge Brockenbrough, in the same case, says: "A bastard may inherit on the part of his mother in like manner as if he were her legitimate son. He may therefore inherit from his mother or from his maternal grandparents in the direct line," etc. And again: "He cannot have whole brothers, but every uterine brother, whether legitimate or spurious, is his half brother." And President Tucker, in the same case, remarks: "To declare them legitimate would have been at once to provide, not a mother only, but a father. To such a length the law-makers were not prepared to go. They were compelled to adopt another phraseology—to use language which, in relation to the mother and her kindred, would put bastards on the footing of legitimates, while it would leave them, as heretofore, in relation to the father, the sons of nobody. But this was the only difference they could have designed." And in conformity with these views, reiterated in every variety of form, it was held in that case, overruling entirely *Stevenson v. Sullivan*, 5 Wheat. 207, that the estate of the bastard dying intestate passed to his mother and to his two uterine bastard brothers.

Comment on these opinions is almost unnecessary. At the common law, he had no mother; this statute gives him one. He is placed in all respects upon the same footing as a lawfully begotten child born of the same mother. He is, therefore, no longer, as to her, *quasi filius nullius*, but her child, inheriting from and through her, transmitting inheritance to and through her. If, seised of property, she dies intestate, the act says it shall descend and pass in parcenary to such of her kindred, etc., in the following course: first, to the children and their descendants. If she dies leaving illegitimate and legitimate children, does not the word "children" comprehend all in the same class? Would it be argued that the illegitimate child would not take with the legitimate children? And when, as we have seen from the extracts aforesaid, this law as expounded includes all her children, legitimate and illegiti-

mate, in the same class as her children, so ascertained by birth, not by legal presumption, and for every purpose, as if all were lawfully begotten, what warrant is there for the pretension that the same general term, when used in a will, is to be construed as excepting them for any purpose? If the term "children" is to be construed in regard to both parents as including the child recognized, or to be deemed legitimate, being born in wedlock, though illegal because the testator, by the use of the general phrase "is to be," must be held to use it in the sense of the law, there being nothing to show he uses it in another sense, must we not apply the same rule when the word is used in reference to the illegitimate child of the female? The law declares the estate shall pass and descend to her children; being a child, he is heir, joint heir with every other child born in or out of wedlock; comprehended in the class, not by any personal designation, but by the general word "children," comprising all.

In *Edwards v. Freeman*, 2 P. Wms. 435, 441, Lord Raymond says: "The statute of distributions makes such a will for the intestate as a father, free from the partiality of affections, would himself make; and this I call a parliamentary will." So in *Garland v. Harrison*, 8 Leigh, 368, Parker, J., says: "The intention was to make such a will for the intestate as, if he had died testate, he would have been most likely to have made for himself." And Tucker, president, says, in the same case: "Our law of descents was formed in no small degree upon the human affections; the legislature very justly conceiving that the object of a law of descents was to supply the want of a will, and that it should, therefore, conform in every case, as nearly as might be, to the probable current of those affections which would have given direction to the provisions of such will. Under the influence of these opinions, they legislated in relation to bastards."

As a legislative will, we have seen that the word "children" includes the legitimate and illegitimate children of a woman in the same class, placing all the issue of the woman upon the same footing as if born in wedlock. When the testator comes to write his own will, and uses the same words, which in the legislative will comprehends all, comprehends them because of the supposed conformity to the probable current of those affections which would have given direction to the provisions of a will, if he had written it, we are asked to say he does not intend to comprehend all, but to exclude the illegitimate child.

The law declares the words in the legislative will includes—the court, in expounding the law, is asked to say the same words used by the testator, in reference to the same matter, excludes—them. By the statutory will, they are her children; by the written will, they continue, as to her, *quasi nullius filius*, and subject to the common-law disabilities of bastards. And this construction is invoked, notwithstanding we are informed by the judges, in the case referred to, that the statute should at all times be liberally construed in favor of those to whom the intestate himself, had he made a will, might be supposed to be most favorable, without regard to common-law rules or feudal disabilities. In *Sleigh v. Strider*, 5 Call, 439, it was decided that a child born out of wedlock in the year 1774 was legitimated by the subsequent marriage and acknowledgment of parents in 1776, which was before the passage of the law of 1785, which took effect January 1, 1787. *Stones v. Keeling*, Id. 143, decided that the issue of a woman by a second marriage, which took place during the life-time of her first husband, are legitimate after the death of their father. These cases, and the case of *Garland v. Harrison*, 8 Leigh, 368, all show that this law has invariably been liberally construed by this court in favor of the class intended to be relieved from common-law disabilities.

If we depart from the rule of construction as laid down by the English cases, that by the use of a phrase which has received a legal signification as comprehending a particular class, the testator must have intended to use it in the same sense when treating of the same subject-matter, we are at sea without compass or rudder. In the place of a clear, definite rule, the discretion of the judge is to be substituted. The inquiry is, Who are the beneficiaries intended by the testator? He has used a phrase referring to a class, and the question is, Who are comprehended in it? The English courts say, in view of their law, he must have intended legitimate children, because the illegitimate children are not by law treated as children, and because, where the children of a man are spoken of, there is no presumption of paternity, except in the case of children born in wedlock. If it is attempted to bring in illegitimate children, it must be done by proof, and the hazard is encountered of giving his estate to aliens to his blood; to persons never acknowledged by him as children. And as none are legitimate who were not born in lawful wedlock, the children of marriages deemed void, etc., cannot be distin-

guished from such as are born in a state of concubinage; it is in law concubinage, and therefore, no presumption can arise in favor of the children. And the same principle, by a too rigid adherence to the rule, has been applied to the children of a woman; giving, as to her, more weight to a fiction of law than to the palpable fact that the illegitimate child is her offspring.

But if there be no legitimate children or possibility of legitimate children, as in case of a devise to the children of a man deceased, but there were illegitimate children, they must have been intended, as none other answer the description. In Virginia, guided by the same rule of carrying out the intention, the children of a man, born in a state of concubinage, would not be considered as falling within the class of children so as to take by such general description. As to the father, the bastard remains *nullius filius*, and there is no legal presumption as to his paternity.

But I take it to be too clear a proposition to require argument to prove it, that in Virginia a child born before marriage, but afterwards recognized by the father who intermarries with the mother, or born of a marriage null in law, but by statute deemed legitimate, would in a devise or bequest to children be held to be included with other legitimate children, unless expressly excluded, in conformity with the principle of the English rule; because, by the recognition or the birth in wedlock, the law presumes them to be children; though in England it would be otherwise. And so adhering to the principle of the rule, when the law makes the bastard child of a woman her child, endows him with every attribute of a child born in wedlock, includes him in the very class designated as children, to whom her estate is to pass in the event of her dying intestate, a testator speaking of her children, the words must be construed to include in the class all who in law are her children. Instead of departing from, such construction adheres to and carries out the rule. The contrary construction substitutes unlicensed discretion, and involves the courts in a labyrinth without a clew to direct them.

It has been suggested that this is a will, not of the mother, but of the grandfather; and we cannot presume he intended to provide for the child of his daughter's shame. The law presumes otherwise; for if his daughter had been dead, and he had then died intestate, in the statutory will made for him, this child would, equally with the legitimate children, have

been provided for; and in the language of the judge in *Black v. Cartnell*, 10 B. Mon. 188, it might be furthermore said "that it cannot be assumed, or even presumed, that if she had an illegitimate son when the will was made, her father would, on account of her fault, have excluded his unoffending grandchild from all participation in his estate, and left him a vagabond, dependent upon the charity of others for sustenance and education." Perhaps, indeed, considering that no matter by whom begot, the relation to the grandfather was the same, and his necessities the greater, such presumption that he did not intend to include (or rather that he intended to exclude, for the law includes), would be contrary to the fact. And at best, it would be substituting vague conjecture for a certain rule.

The argument against the policy of such construction, as affecting female purity and public morality (springing perhaps originally out of the maxims of a fulfilled dispensation, which visited upon the children, to the third and fourth generation, the sins of the parent), may be met by the inquiries of Tucker, president, in *Garland v. Harrison*, 8 Leigh, 368: "Was the policy of the marriage institution more fatally invaded by concubinage than by bigamy? Was illicit intercourse out of wedlock more to be deprecated than incest in wedlock?" Yet the fruits of such intercourse are legitimate. And in *Brewer v. Blougher*, 14 Pet. 178, which arose under a law similar in substance to ours as to bastards, the court decided that the issue of an incestuous marriage between father and daughter, though illegitimate, were embraced by the statute. Chief Justice Taney says: "The right to inherit would appear to have been given upon the principle that it would be unjust to punish the offspring for the crime of the parents; and their right therefore is not made to depend upon the degree of guilt of which they were the offspring." But in the language of Judge Brockenbrough, in *Garland v. Harrison*, 8 Leigh, 368, this argument as to public policy "is a consideration which would be more appropriately addressed to a legislative body than a judicial tribunal." And there I leave it. It is for that body to give the law; for this to declare it.

The rule of the English courts had no reference to questions of public policy. It rested upon the intention of the testator, and the mode of arriving at it. The right of an illegitimate child to take, if the testator so intended, was never questioned; and this, under circumstances more likely to affect public morals than a construction which includes a bastard amongst

the children of his mother under our statute. Jarman on Wills, 112, deduces these rules, amongst others, from the cases: That illegitimate children may take by any name or description which they have acquired by reputation at the time of making the will; that legitimate and illegitimate children may take concurrently under a *designatio personarum* applicable to both; that a gift to an illegitimate child *en ventre sa mere*, without reference to the father, is indisputably good; and that it is questionable whether, at this day, a gift to the future illegitimate child of a woman would be sustained on the ground of public morals—though there are *dicta* which would seem to lead to a different conclusion.

These conclusions show the length to which the English courts have gone in giving effect to the dispositions of testators when the intention is clear; though such dispositions may not commend themselves as calculated to preserve purity in the sexual relations.

I think the illegitimate child in this case was, by the law of Virginia, within the class comprehended by the word "children" of a woman; that by the use of the word here, the testator must be intended to have referred to and included him with the other children of his daughter, whether born in wedlock or not, and that he takes equally with them, there being nothing in the case to show an intention to exclude him.

I am for affirming the decree, with damages and costs.

DANIEL, LEE, and ROBERTSON, JJ., concurred in the opinion of ALLEN, P.

MONCURE, J., dissented.

Decree affirmed.

RIGHT OF BASTARD TO INHERIT FROM OR THROUGH HIS MOTHER: See note to *Simmons v. Bell*, 56 Am. Dec. 263, where this subject is discussed at length.

EARLY AND WIFE v. FRIEND.

[16 GRATTAN, 21.]

ONE TENANT IN COMMON MAY MAINTAIN SUIT AGAINST HIS CO-TENANT who has used and occupied the whole of the common property, for an account of the rents and profits.

WHEN PROPERTY OWNED BY SEVERAL TENANTS IN COMMON IS USED AND OCCUPIED BY ONE ONLY, the property being of such a nature as not to admit of its use and occupation by several, or when the property, though

capable of use and occupation by several, is yet so used and occupied by one as, in effect, to exclude the others, he receives more than comes to his just share or proportion within the meaning of the Virginia statute, and is accountable to the others.

TENANT IN COMMON WHO OCCUPIES AND USES WHOLE OF COMMON PROPERTY himself is liable to his co-tenants for a reasonable rent therefor in the condition in which it was when he took possession.

INTEREST SHOULD BE PAID BY OCCUPYING TENANT IN COMMON upon the rents found to be due from him to his co-tenants.

BILL filed by Richard K. Cralle against Joseph and Thomas R. Friend, Samuel H. Early and wife, and others, asking for an account of the rents, issues, and profits of a certain salt property and a tract of land in the county of Kanawha, which the Friends owned as tenants in common with the plaintiff and the other defendants, and of which the Friends had held exclusive possession. The facts necessary to an understanding of the points decided by the court are as follows: Dr. John J. Cabell died in 1834, leaving, with other estate, a valuable salt property and a tract of land in Kanawha county. The persons entitled to share his estate were his widow and five children; viz., Mrs. Cralle, wife of Richard K. Cralle, Mrs. Ward, wife of Henry C. Ward, Mrs. Friend, the wife of Thomas R. Friend, Paulina Cabell, and Henry Ann Cabell, who afterwards married Samuel H. Early. Thomas R. Friend qualified as administrator on the estate. In November, 1834, the widow and heirs of John J. Cabell filed a friendly bill in the hustings court of Lynchburg for a division of his estate, and commissioners were appointed to make the division. Prior to October, 1835, Henry C. Ward had died, Paulina Cabell had died an infant intestate and unmarried, and Mrs. Cralle had died leaving an infant daughter, Mary C. Cralle. In October of that year, these deaths were suggested, and Mary C. Cralle was made a party plaintiff. The court then set aside the former order appointing commissioners to divide the estate, and at the same time reappointed them with directions to assign the widow her dower, and to divide the property among the four surviving heirs, Mary C. Cralle being substituted for her mother. The commissioners divided the other property, but in relation to the salt property on the Kanawha, they said: "That a portion of Dr. Cabell's real estate, to wit, the salt-works and furnace on the Kanawha, does not seem to them capable of division; and as they are now of great value, and as their present value may hereafter be still more increased or diminished, according to a variety of circumstances, they have

felt it their duty to give to each party a certain designated interest therein, so that each may be alike profited by an advancement of its value, or suffer equally from any further depreciation." They valued the property at twenty-five thousand dollars, allotted one third of this sum to the widow as her dower, and to each of the four surviving heirs allotted one fourth of the remainder. The tract of land on the Kanawha was allotted to the four heirs, to each one an undivided fourth. After the commissioners made their report, the parties seem to have taken possession of the real estate allotted to them in severalty. Nothing more was done in the case until November, 1845, when the report was directed to lie one month for exceptions; and no further proceedings appear to have been taken in the cause. On the nineteenth of December, 1835, Mrs. Cabell, acting for herself and as guardian of her daughter, Henry Ann Cabell, leased their interests in the salt property to Thomas R. Friend, for the time and upon the terms mentioned in the opinion. By a deed of the same date, Mrs. Ward conveyed to Thomas R. Friend her fourth in the two thirds of the salt property, her fourth in the third allotted to Mrs. Cabell for life, and her fourth of the tract of land on the Kanawha. Thomas R. Friend, having thus acquired the interest of Mrs. Cabell, Henry Ann Cabell, and Mrs. Ward, and being entitled to another fourth in right of his wife, took possession of the salt property, and he and his father, Joseph Friend, worked it in partnership until 1842, when Thomas R. Friend conveyed all his interest in the property to Joseph Friend, who continued to work the property on his own account from that time. The property was, at the time when they took possession, very much out of repair, and while they occupied it they made very expensive improvements which greatly increased the issues and profits. Mrs. Cabell died in 1843, and in the same year Henry Ann Cabell attained the age of twenty-one years. In 1846, she married Samuel H. Early, a marriage settlement having been previously executed whereby her property was conveyed to Jubal A. Early, in trust for her separate use. The rent due to Mrs. Cabell and to Henry Ann Cabell was paid up to 1843. The plaintiff Cralle received rent for his interest as tenant by the curtesy in the property up to the year 1841. Before the filing of the bill in this case, Mrs. Ward and Mrs. Thomas R. Friend had died, the latter leaving four infant children, who were made parties defendants in this suit. In 1848, the court directed accounts of the rents,

issues, and profits of the salt property and of the tract of land on the Kanawha, while in the possession of the Friends, to be taken. One of these accounts was to commence when they took possession, and be continued until the twenty-eighth of January, 1842, when Thomas R. Friend died, and was to be charged to them jointly. The other was to extend from that time down to the first day of the next term of court, and was to be charged to Joseph Friend. The commissioner returned his report, which was excepted to by all the parties, and the cause came to a hearing on the twenty-second of February, 1853, when the court made a decree which was modified by a decree made on the seventeenth of February, 1855. By these decrees, the court held that the co-tenants of the Friends were entitled to share in the actual profits made on the salt property, according to their several interests, and to recover from the Friends their share of the net profits which had been received by them, except for such time as the shares of any of the parties were actually rented, or for which they had theretofore received compensation. And the court having determined the interests of the parties, and fixed the time from which they were each entitled to share them, and having also fixed the nature of the allowances which should be made to the Friends, and having decided that they were not to be charged with interest upon the annual profits, the report was recommended, with instructions to the commissioner to restate and settle the account upon the evidence then in the record or that might be produced. From this decree, Samuel H. Early and wife, and the trustee, Jubal A. Early, appealed. Other facts are stated in the opinion.

Beverly R. Johnston and Price, for the appellants.

Conway Robinson and Fry, for the appellees.

By Court, MONCURE, J. The first question to be disposed of in this case is one of jurisdiction, which was raised in the argument before this court. It was not raised by any of the defendants in the court below by plea, answer, or otherwise, so far as the record shows; but on the contrary, the answers of the principal defendants, in effect, admitted the jurisdiction of the court. The only notice which seems to have been taken of the subject in that court is contained in the decree of the twenty-second day of February, 1853, in which an opinion is expressed by the court that it had jurisdiction of the case, upon the principles declared by the court of appeals

in the case of *Ruffners v. Lewis*, 7 Leigh, 720 [30 Am. Dec. 513]. If the defendants, Joseph and Thomas R. Friend, are bound to account with the plaintiff and their other co-tenants in common for rents and profits of the common property, while it was solely occupied and enjoyed by the Friends, as claimed by the bill, then, undoubtedly, a court of equity has jurisdiction of the case. It involves the settlement of an account of rents and profits in which, according to that supposition, the plaintiff and defendants have a common interest in different proportions, and some of the parties concerned are infants. I will, therefore, proceed to consider the case upon its merits.

The appellees, the Friends, by their counsel, contend that they are not bound to account at all for such rents and profits to their co-tenants in common, at least to such of them as were adults when the property was occupied and enjoyed as aforesaid; and that, therefore, the bill ought to have been dismissed. They insist that, as tenants in common, they had a right to occupy and use any part, or all, of the common property, without being accountable, in any form or to any extent, to their co-tenants, unless they contracted with them for such accountability, or ousted or excluded them from the possession, or unless they destroyed or wasted the common property; none of which, they say, did they do.

This would certainly have been the case at common law. "If one joint tenant, or tenant in common, of land," says Coke, "maketh his companion his bailiff of his part, he shall have an action of account against him, as hath been said. But, although one tenant in common, or joint tenant, without being made bailiff, take the whole profits, no action of account lieth against him; for in an action of account, he must charge him either as a guardian, bailiff, or receiver, as hath been said before; which he cannot do in this case, unless his companion constitute him his bailiff. And therefore, all those books which affirm that an action of account lieth by one tenant in common, or joint tenant, against another, must be intended when the one maketh the other his bailiff, for otherwise, never his bailiff to render an account, is a good plea." 1 Thomas's Co. Inst. 787. And in a note by the editor, it is said: "At common law, joint tenants and tenants in common had no remedy against each other, where one alone received the whole profits of the estate, since he could not be charged as bailiff or receiver to his companion, unless he actually made him so:" Id. 788, note r.

But the statute 4 Anne, c. 16, sec. 27, was passed in England to remedy this defect of the common law. And a similar statute was passed in this country at an early period, and has ever since continued in force. In the code, p. 586, c. 145, sec. 14, it is in these words: "An action of account may be maintained against the personal representative of any guardian, bailiff, or receiver, and also by one joint tenant or tenant in common, or his personal representative, against the other as bailiff, for receiving more than comes to his just share or proportion, and against the personal representative of any such joint tenant or tenant in common."

But it is contended that this statute makes a joint tenant or tenant in common liable to account to his co-tenants only where he receives money, or something else given or paid by another, which all the tenants are entitled to in proportion to their interests as such, of which one receives more than his just share according to that proportion; and not where he merely has the sole occupation and enjoyment of the property, even though, by the employment of his own industry, skill, and capital, he makes a profit by such occupation and enjoyment, and takes the whole profit to his own use; and that therefore the Friends, not having received any rent from others for which they are accountable, but having only occupied and enjoyed the property as aforesaid, are not liable to account to their co-tenants for any profits which may have been made by such occupation and enjoyment, nor for any rent or other compensation whatever.

In support of this position, a very important case decided in 1851 in the exchequer chamber, *Henderson v. Eason*, 17 Ad. & El., N. S., 701, S. C., 79 Eng. Com. L. 701, is cited and much relied on by the counsel of the Friends; and it must be admitted that it fully sustains their position, and if it were a binding authority, might be conclusive of this case. The question came fairly up for decision in that case. It was an action of account founded on the statute 4 Anne, c. 16, by Robert Eason against the executor of his co-tenant in common, Edward Eason. The pleadings were in proper form. On the trial of the issues, evidence was given that the two Easons were tenants in common of a farm from November, 1833, to November, 1838, during which time Edward Eason occupied the whole on his own account; that he cultivated the same on his own account solely, and appropriated the produce to his own use; that he cropped the farm in the usual way, kept the

usual quantity of live and dead stock, and farmed well; and that he received all the produce of the farm, and sold it on his own account. Verdict was found for the plaintiff, and upon an account thereafter taken, the sum of nine hundred pounds was found to be due to him, for which judgment was accordingly rendered. The case was brought by error from the queen's bench to the exchequer chamber, where it was fully and ably argued. Parke, B., in delivering the judgment of the court, lays great stress on the word "receiving" in the statute. "Every case," he says, "in which a tenant in common receives more than his share is within the statute, and account will lie when he does receive, but not otherwise. . . . He is to account when he receives, not takes, more than comes to his just share. What, then, is a 'receiving' of more than comes to his just share, within the meaning of that provision of the statute of Anne? It appears to us that, construing the act according to the ordinary meaning of the words, this provision of the statute was meant to apply only to cases where the tenant in common receives money or something else, where another person gives or pays it, which the co-tenants are entitled to simply by reason of their being tenants in common, and in proportion to their interests as such, and of which one receives and keeps more than his just share according to that proportion. The statute therefore includes all cases in which one of two tenants in common of lands leased at a rent payable to both, or of a rent-charge, or any money payment or payment in kind, due to them from another person, receives the whole, or more than his proportionate share, according to his interest in the subject of the tenancy. There is no difficulty in ascertaining the share of each, and determining when one has received more than his just share; and he becomes, as to that excess, the bailiff of the other, and must account. But when we seek to extend the operation of the statute beyond the ordinary meaning of its words, and to apply it to cases in which one has enjoyed more of the benefit of the subject, or made more of its occupation, than the other, we have insuperable difficulties to encounter." The learned judge proceeds to enumerate these difficulties, and concludes by reversing the judgment of the queen's bench: See 3 Robinson's Practice, new ed., 173, where this case is fully stated, and other cases on the subject are referred to.

This decision certainly settles the construction of the statute in England. But it is somewhat remarkable that its construc-

tion had not there been settled long before. And it would seem that until that decision was made, the current, or at least the preponderance, of judicial opinion in that country was the other way. That was the opinion of Vice-Chancellor Wigram, in *McMahon v. Burchell*, 3 Hare, 97, S. C., 25 Eng. Ch. 97, decided in 1843, though afterwards reversed by Lord Chancellor Cottenham, 2 Phill. 127, S. C., 22 Eng. Ch. 127, upon the ground that mere occupation by one of several tenants in common of an estate, if unaccompanied by exclusion, does not make him liable for rent to his co-tenants, and that the nature of the occupation in that case did not amount to such exclusion. That was the opinion also of Vice-Chancellor Shadwell, in *Henderson v. Eason*, 15 Sim. 303; S. C., 38 Eng. Ch. 303, decided in 1846; though Lord Cottenham doubted, on appeal, whether the claim allowed by the vice-chancellor could be maintained, and directed an action to be brought: *Henderson v. Eason*, 2 Phill. Ch. 308; S. C., 22 Eng. Ch. 308. And that was also the opinion of the court of queen's bench in *Eason v. Henderson*, 12 Ad. & El., N. S., 986, S. C., 64 Eng. Com. L. 986, decided in 1848, on a case stated for the opinion of the court by order of a judge, after issue joined in an action brought by direction of the lord chancellor as aforesaid. Lord Denman, C. J., in delivering the opinion of the court, said: "The case stated that he (the defendant) had occupied and received the whole profits, but no part was underlet; he received no rent, nor anything but the profits derived from the culture of the lands, to the expense of which the plaintiff in no way contributed. It was contended that the defendant was not liable as bailiff, because it appeared that he had not received rent, and because it did not appear that he had received more than his just proportion. But we think that the words 'rents, issues, and profits' include the proceeds of the land, whether in money or in kind," etc. The lord chancellor, it appears, being dissatisfied with that proceeding for some cause, directed another action to be brought, which was accordingly brought, and was finally decided in the court of exchequer chamber as before mentioned.

If the decision of that court, instead of being made in 1851, had been made before the statute of 4 Anne, c. 16, sec. 27, was adopted by us, the construction which that decision settles in England would have been adopted by implication along with the statute. But as at the time of the adoption of the statute by us there had been no English decision construing it, we are left free to construe it according to its apparent meaning,

and the probable intention of the legislature, without being controlled by subsequent decisions in England or elsewhere, other than in our own state. Though certainly we will always pay due respect to decisions out of our state, and none are entitled to more respect than those of the English courts, and especially the court of exchequer chamber.

What, then, is the meaning of the words in our statute, "for receiving more than comes to his just share or proportion"? What did the legislature intend by the use of those words? Did they only intend to make a tenant in common accountable to his co-tenants for receiving from a stranger on account of rents and profits of the property more than the just share or proportion of such tenant? Or did they intend to make him accountable for receiving more than his just share or proportion of the rents and profits, whether paid by a stranger or derived from his own occupation and enjoyment of the property? I think they intended the latter. The former construction may be a reasonable one in England, where the ordinary mode of deriving profit from real estate is by renting it out; but not in this state, where real estate is generally occupied and used by the owner. With all deference to the court of exchequer chamber, I think the construction they put upon the word "receiving" is too technical and narrow, at least for our country; and if it be a just one in England, it is because of circumstances existing there which do not exist here. I do not see the force of the distinction drawn by that court between the words "receive" and "take" in this connection. I think the word "receiving" in the statute literally means a receiving of profits, as well by use and occupation as by renting out the property. At all events, there is, in substance, no difference between them, and the former is as much within the reason and the meaning of the law as the latter. If a tenant in common rent out the property, and receive more than his just share of the rent, he is accountable for the excess to his co-tenants. Why should he not be alike accountable when, instead of renting out the property, he solely occupies and uses it, and thus receives more than his just share of the profits? Why should he be told: "If you rent out the property and receive the rent, you must share it out with your co-tenants. But if you solely occupy and use it, and take all the profits, you will not be accountable to them." Would he hesitate between these alternatives?

I think the same principle precisely applies to the two cases.

And the only difficulty which exists is in the application of the principle to one of the cases. That difficulty was much commented on by the court in the case decided by the exchequer chamber, and was one of the causes, if not the chief cause, of that decision. In the case of rent received from a stranger, "there is no difficulty," the court said, "in ascertaining the share of each, and determining when one has received more than his just share." But in the case in which one has enjoyed more of the benefit of the subject, or made more by its occupation than the other, "we have insuperable difficulties to encounter." The court then proceeded to enumerate the difficulties.

I readily admit the existence of difficulty, but not that it is insuperable; certainly not in all cases. It consists in the fact that the occupying tenant has rights as well as his co-tenants, which two classes of rights must, if possible, be reconciled. The statute was not designed to take away or impair the rights of the occupying tenant, but to require them to be so used as not to interfere with those of his co-tenants. Each tenant has a right to occupy and use the common property, but not to the exclusion of his co-tenants. The occupation of one does not necessarily exclude the occupation of the others. They cannot, by remaining out, make the occupying tenant their bailiff against his will. He can be made their bailiff only by contract with them; or, under the statute, by receiving more than comes to his just share or proportion. It is often difficult to determine when, by mere occupation and use of the property, he receives more than this just share. And it is still more difficult to lay down any general rule on the subject. This rule, at least, may be laid down, that whenever the nature of the property is such as not to admit of its use and occupation by several, and it is used and occupied by one only of the tenants in common, or wherever the property, though capable of use and occupation by several, is yet so used and occupied by one as in effect to exclude the others, he receives more than comes to his just share or proportion, in the meaning of the statute, and is accountable to the others.

This rule is of easy application to this case, and is, I think, sufficient for its solution. The salt property, of which the rents and profits are the subject of controversy here, if capable of use and occupation by several, which is at least extremely doubtful, has certainly been so used and occupied by the Friends as in effect to exclude their co-tenants therefrom.

The Friends have solely occupied and used it, and derived all the benefit which they could have derived from it had they been the sole owners. And they so occupied and used it as plainly to indicate that they considered themselves, and must have been considered by the other parties concerned, as renters of the property, and not as tenants in common merely. They actually held the dower interest of Mrs. Cabell, being one undivided third of the property, and the interest of Mrs. Early, being one undivided fourth of the other two thirds, under a lease for ten years, dated the nineteenth day of December, 1835, at a certain annual rent for each interest. These interests, with others which they owned, made them proprietors of almost the entire subject. After the determination of the lease, they continued to occupy and use the property as before. Indeed, they never, until recently, denied their accountability to their co-tenants in some form or to some extent, for a participation in the rents and profits, but seem to have admitted their liability to Early and wife, or her trustee, for the same annual rent of her interest after she became of age as before, on the ground that they continued to hold that interest under an implied contract, on the terms prescribed by the expired lease; and to the proprietors of the other outstanding interests, for the yearly value thereof in the condition in which the property was when it came into the hands of the Friends. They only denied the right of their co-tenants to participate in issues and profits which may have arisen alone from their labor, skill, and capital in the use of the property, without being accountable for the losses of the operation.

The construction of the statute for which I contend is, I think, the same which has always been acted upon in this state. It was acted upon without question in the only case on this subject decided by this court; I mean *Ruffners v. Lewis*, 7 Leigh, 720 [30 Am. Dec. 513], which was argued by counsel of great experience and ability. The question in that case was, not whether the defendants were liable at all, but on what principle, and to what extent. Carr, J., said: "The Ruffners must be treated as tenants in common with Prior, not as trespassers. They are liable for a fair share of the profits, and entitled to full compensation for their expenses fairly and reasonably incurred; as well those attending their abortive efforts to find water as their more fortunate ones." The opinion of Tucker, P., was to the same effect, and the other judges concurred therein.

The same construction has also been adopted and well established in South Carolina. In *Thompson v. Bostick*, 1 McMull. Eq. 75, before Chancellor Harper, in 1830, the defendants, who were tenants in common with the plaintiffs of a tract of land, had taken possession of it and cultivated all the cleared land. They also cleared and cultivated another portion of the land, and made improvements; and the question was, whether and to what extent they were chargeable. "I am of opinion," said the chancellor, "that defendants ought to be charged with the rent of land estimated as it was when they took possession of it, and are not to be charged with the rent of the newly cleared land, or credited for improvements. There is nothing, I think, in the objection that the defendants did not receive rent, but cultivated the lands themselves. To cultivate and have the use of lands is to receive the rents and profits, though the occupier is his own tenant." This decision (at least as to the rents and profits of the cleared land, the other part of the decree not having been appealed from) was afterwards affirmed on appeal. In *Holt v. Robertson*, 1 McMull. Eq. 75, before Chancellor Desaussure, in 1831, and afterwards in the court of appeals, the decision was to the same effect. And so also was it in *Hancock v. Day*, Id. 69 [86 Am. Dec. 293], decided by the court of appeals in 1840.

The case of *Sargent v. Parsons*, 12 Mass. 149, decided in 1815, was cited and much relied on as being to the same effect with the decision of the exchequer chamber before referred to. But the action in that case was a common-law action of account, and not an action upon the statute 4 Anne, c. 16; and most of the remarks of Parker, C. J., refer to the common law, and not the statute. The property in that case consisted of houses, lands, and wharves, and though they were for a period in the sole possession and occupancy of the defendants, it does not appear that their occupation of the property was of such a nature as to exclude their co-tenants therefrom. In a note to that case, it is stated "that it does not seem to be necessary that the defendant should have received profits otherwise than by his occupancy, in order to give a cause of action to the plaintiff upon the statute. It is sufficient if he have any way received more of the issues or profits than comes to his just share and proportion;" for which is cited Dane's Abr., c. 8, art. 8, sec. 18.

I therefore think the Friends are accountable for rents and

profits to their co-tenants in common, and the question next to be considered is, In what manner and to what extent are they so accountable? Are they accountable for issues and profits actually made by the application of their labor, skill, and capital, to the property? or are they accountable for the fair yearly value of the property in the condition in which it was at the time it came to their possession?

I think the latter is the just and true measure of accountability, and one that is perfectly consistent with the statute. There is a very material difference between the nature of a liability of a bailiff at common law, and of a tenant in common who is a bailiff under the statute. The former is a fiduciary, bound to manage the estate to the best advantage, and make all the profit he can for the owners, and to keep and render to them a full and fair account of his transactions; and he is liable, not only for rents and profits actually received, but also for such as might have been received without his default; while the latter is accountable only for rents and profits actually received, more than his just share and proportion. He is bailiff only by virtue of his receiving more than his just share, and in an action of account against him, it is an essential averment of the declaration that he has received more than his share: *Wheeler v. Horne*, Willes, 208; *Sturton v. Richardson*, 13 Mee. & W. 17; *Henderson v. Eason*, 17 Ad. & El. N. S., 719; S. C., 79 Eng. Com. L. 718. He is not a fiduciary, nor a trespasser, but has a right to occupy and use the property. When he rents it out and receives the rent, there is no difficulty in ascertaining the amount for which he is accountable. When, instead of renting it out, he occupies and uses the whole to the exclusion of his co-tenants, and thus, in effect, becomes himself the renter, there is more difficulty; but it seems to me that the just and true rule is, to charge him with a reasonable rent for the use and occupation of the property in the condition in which it was when he received it, and to hold him accountable to his co-tenants for their just shares of such rent.

This rule does justice to all parties concerned, and gives the same just measure of compensation to the co-tenants whether the property be rented out by one of them, or be occupied and used by him to the exclusion of the rest. It does not make the compensation in the latter case depend upon the accident of his being a good or bad manager, a prudent and cautious person, or a wild and reckless speculator. It is just to the

occupying tenant, who, having occupied and used the property instead of renting it out, ought to be accountable to the same extent as if he had rented it out and received the rent. It is just to his co-tenants, who are entitled to a share of the rent of the property, but not of the issues and profits of his labor, skill, and capital applied to its use. They do not share in the risk, and ought not to share in the profit of the operation.

The rule is not inconsistent with any authority that I have seen. In *Ruffners v. Lewis*, 7 Leigh, 720 [30 Am. Dec. 513], an account was taken of rents, profits, etc., but no question was raised in that case as to the correct mode of adjustment, and the one adopted may have been more favorable to the occupying tenant than to have charged him with a rent, especially as he was allowed by the express terms of the decree, not only for permanent improvements, and for his expenses and actual services in his successful operations, but also for his expenses, labor, and services in the course of his unsuccessful experiments. In *Thompson v. Bostick*, 1 McMull. Eq. 77, the rule in question was adopted. "If the whole estate," said Chancellor Harper, "were let to tenants, and certain rents reserved, as is commonly the case in England, there would be little difficulty. But what rule shall be adopted when one tenant in common has occupied part of the premises himself? I know of no other than to estimate the rent of the whole premises, and then to value the rent of that portion of the premises occupied by the tenant in possession, with reference to the condition they were in at the time he took possession."

There may be peculiar circumstances in a case making it proper to resort to an account of issues, profits, etc., as a mode of adjustment between the tenants in common; and that was perhaps the case in *Ruffners v. Lewis*, 7 Leigh, 720 [30 Am. Dec. 513]; but such cases would merely be exceptions to the rule I have laid down, which, I think, is properly applicable to most, if not all, cases.

It applies, I think, with peculiar propriety to this case; in which the occupying tenants, the Friends, had themselves a large interest in the subject as tenants in common, and were lessees (or one of them at least a lessee) of other large interests therein of other tenants in common, and embarked and were for many years engaged in a most hazardous operation upon the property, requiring, for its successful result, the expenditure of a vast amount of labor and of capital, and the exercise of the greatest skill and prudence. During all this

period, the proprietors of the outstanding interests stood aloof, and did not offer to join in the adventure, to contribute to the means of its prosecution, to run the risk of its failure, and take the chance of its successful issue. They cannot now come forward and say the operation has been successful, and they are entitled to a share of the profits. The most they are entitled to is their share of a reasonable rent. The Friends are accountable for that. Being themselves proprietors of some and lessees of other interests in the subject, and occupying and using the whole of it, it is just and right, and what they must have expected and intended, that they should pay a reasonable rent for the outstanding interests. But upon no principle of justice are they bound to account for issues and profits. Nor could such an account now be settled so as even to approach a correct result. It is no easy matter to keep an account of transactions so extensive, and running through so long a series of years, and be prepared with proper vouchers for a settlement; and the Friends were under no obligation to do so. Then they are accountable only for a reasonable rent, and the next question is, How is the amount of such rent to be ascertained?

In regard to the appellants, I think there can be no difficulty. Mrs. Early's interest of one fourth of two thirds of the property was leased by her guardian to Thomas R. Friend, at an annual rent of three hundred dollars, for a term of ten years, subject to be determined after her arrival at age or marriage, at the election of her or her husband. She arrived at age in 1843, and married in 1846, but as it is averred in the answer of Joseph Friend and not disproved nor denied, neither she nor her husband has "ever expressed any wish to change the terms of respondent, holding under the lease aforesaid, and hence he has always hitherto regarded himself as holding and occupying under the original rent reserved." The lease commenced December 25, 1836, and of course expired, if not determined before by election as aforesaid, December 25, 1846. There was no such election to determine it before, and therefore, by its terms, it continued in force until the last-mentioned day. And Joseph Friend having after that day continued to hold and use the property as before, without any objection on the part of Early and wife or her trustee, he might be considered holding on the terms of the previous lease, according to the authorities cited by his counsel, to wit: 2 Robinson's Practice, new ed., 378, 379; *Hyatt v. Griffiths*, 17 Ad. & El., N. S., 505;

S. C., 79 Eng. Com. L. 505; *Humphreys v. Franks*, 36 Eng. L. & Eq. 429. In *McKay v. Mumford*, 10 Wend. 851, it was held that the presumption of law, that a tenant who holds over after the expiration of his lease continues to hold under the landlord and on the terms of the lease, does not apply to a tenant in common who leases the undivided interest of his co-tenant. "The fact of his not leaving possession," said the court, "does not authorize the inference that he still intends to hold under the lease; on the contrary, the presumption is, that he holds under his own title, which gives him a right to the possession and enjoyment of the whole estate, liable however to account to his co-tenants at law: 1 R. S. 90; or in equity: *Sherman v. Ballou*, 8 Cow. 304. This presumption of possession by virtue of his own title may undoubtedly be rebutted, and then he would hold, as to the moiety of his co-tenant, as any other tenant and subject to the same rules of law." If there be any such presumption, it is rebutted in this case by the express admission of Joseph Friend that after the expiration of the lease "he always regarded himself as holding and occupying under the original rent reserved." I therefore think that the rent for the interest of Mrs. Early, during the whole period of the use and occupation of the property by the Friends, ought to be at the rate paid by the lease.

In regard to the proprietors of the other outstanding interests, there may be more difficulty. But I think it ought to be presumed, as to them, that the rent agreed to be paid to Mrs. Early—that is, three hundred dollars—was a fair and reasonable rent for her interest of one fourth of two thirds; which would make the annual rent of the whole property, while in the use and occupation of the Friends, eighteen hundred dollars; and that they ought to be charged with rent at that rate, unless it be proved that a reasonable rent would be more; in which case, they ought to be charged with such reasonable rent. I think the Friends ought to pay at least the same rate of rent for the other outstanding interests as for that of Mrs. Early. They derived the same benefit, in proportion, from those interests as from hers; and the fact that they made no contract for the use of the former is certainly no reason for paying less rent for them than for the latter. They must have expected and intended to pay the same rate of rent to all the other parties interested in the property with themselves as they agreed to pay for the interest of Mrs. Early, except the dower interest, for which an annual rent of five hundred

dollars was agreed to be paid. Why less rent in proportion was agreed to be paid for the dower interest than for that of Mrs. Early does not appear. It may have been because the former interest was determinable at any time by the death of the dowress, while the latter was more permanent. At all events, I think the agreed rent of the latter is a fairer criterion than that of the former for the ascertainment of the amount of rent to be paid for the other outstanding interests. I think the proprietors of those interests, having made no contract with the Friends, or either of them, ought to have the liberty of showing, if they can, especially as most of them were infants during the use and occupation of the property by the Friends, that it was reasonably worth more rent in proportion than what was agreed to be paid for the interest of Mrs. Early.

The Friends, being accountable to their co-tenants for a reasonable rent of the property, and not for the issues and profits of their operations thereon, ought to pay interest on the rent of each year from the end of such year until payment.

Upon the whole, I think that so much of the decrees of the circuit court as is in conflict with the foregoing opinion is erroneous, and ought to be reversed, with costs to the appellees, the Friends, as the parties substantially prevailing, and the cause remanded to the circuit court to be proceeded in to a final decree according to the principles above declared.

The other judges concurred in the opinion of MONCURE, J.

Decrees reversed in favor of the appellees.

LIABILITY OF CO-TENANTS TO ACCOUNT FOR RENTS AND PROFITS, AND FOR USE AND OCCUPATION OF COMMON PROPERTY.—All the authorities agree that the common law provided no means by which one joint tenant or tenant in common could compel his co-tenant who continued in possession of the common property, and took more than his share of the rents and profits of the estate, to account to him for his proportion thereof, unless such rents and profits were received by one as the bailiff of the other: *Freeman on Cotenancy and Partition*, sec. 269; *Co. Lit.* 209 b; *Wheeler v. Horne*, Willes, 208; *Henderson v. Eason*, 17 Ad. & El., N. S., 701, 718; S. C., 79 Eng. Com. L. The statute of 4 & 5 Anne, c. 16, sec. 27, was passed to remedy this defect in the common law. That statute provided that "actions of account shall and may be brought and maintained against the executors and administrators of every guardian, bailiff, and receiver; and by one joint tenant, and tenant in common, his executors, and administrators, against the other as bailiff, for receiving more than comes to his just share or proportion; and against the executor and administrator of such joint tenant or tenant in common; and the auditors appointed by the court, when such action shall be depending, shall be, and are hereby, empowered to administer an oath, and examine the

parties touching the matters in question, and for their pains and trouble is auditing and taking such account have such allowances as the court shall adjudge to be reasonable, to be paid by the party on whose side the balance of the account shall appear to be." Statutes similar to this were enacted at an early day in many of the states of the Union. In the case of *Henderson v. Eason*, *supra*, referred to in the principal case, it was decided that, under the statute of Anne, a joint tenant or tenant in common is only liable to account to his co-tenant when he has actually received from a third person the rents and profits of the common property. And a majority of the courts in the United States have given a like construction to similar statutes enacted in this country: *Freeman on Cotenancy and Partition*, sec. 275; *Pico v. Columbat*, 12 Cal. 414, 420; *Goodenow v. Ewer*, 16 Id. 461, 471; *Bird v. Bird*, 15 Fla. 424; *Crane v. Waggoner*, 27 Ind. 52; *Scantlin v. Allison*, 32 Kan. 376; *Nelson's Heirs v. Clay's Heirs*, 7 J. J. Marsh. 141; *Bridgford v. Barbour*, 80 Ky. 529; *Israel v. Israel*, 30 Md. 120, 126; *Sargent v. Parsons*, 12 Mass. 152; *Shapard v. Richards*, 2 Gray, 424; *Ragan v. McCoy*, 29 Mo. 336; *Woollever v. Knapp*, 18 Barb. 265; *Dresser v. Dresser*, 40 Id. 300; *Wilcox v. Wilcox*, 43 Id. 327; *Scott v. Guernsey*, 60 Id. 163; *Osborn v. Osborn*, 62 Tex. 495. There are, however, some cases in this country that, like the principal case, refuse to adopt the English rule on this subject. They hold that a tenant in common who prevents his co-tenants from obtaining from the premises held in common their just shares of the profits or income which the premises are capable of yielding, or who takes possession of the whole, and uses them as his own, and thereby makes a profit, is bound to account to his co-tenants, either for the rental value of the premises, or the profit he has made, although he may not have received any rents from third persons: *Shiels v. Stark*, 14 Ga. 429; *Huff v. McDonald*, 22 Id. 131; *Inard v. Bodine*, 11 N. J. Eq. 403; *Barrell v. Barrell*, 25 Id. 173; *Buckelew v. Snedeker*, 27 Id. 82; *Edsall v. Merrill*, 37 Id. 114; *Thompson v. Bostick*, 1 McMull. Eq. 75; *Holt v. Robertson*, Id. 475; *Valentine v. Johnson*, 1 Hill Ch. (S. C.) 49; *Lyles v. Lyles*, Id. 86; *Jones v. Massey*, 14 S. C. 292; *Scatfe v. Thomson*, 15 Id. 337; *Pearson v. Carlton*, 18 Id. 47; *Tyner v. Fenner*, 4 Lea, 469; *Hayden v. Merrill*, 44 Vt. 336; *Graham v. Pierce*, 19 Gratt. 38; *Newman v. Newman*, 27 Id. 714; *White v. Stuart*, 76 Va. 567; *Buffners v. Lewis's Ex'rs*, 30 Am. Dec. 513. The statutes of some states provide that a co-tenant in possession shall be required to account to his fellow for the use and occupation of the common property. Thus the Maine statute provides that, "if any one or more of the joint tenants or tenants in common take the whole rents or income of the joint estate, or more than their share, without the consent of their co-tenants, and refuse, for a reasonable time after demand, to pay such co-tenants their share thereof, any one or more of them may have an action of special *assumpsit* against the refusing co-tenants to recover their proportion thereof:" R. S. Me. 1883, p. 791, sec. 20. In *Richardson v. Richardson*, 72 Me. 403, it was held that this statute extended the remedy to cases of personal occupancy by the co-tenant: See also *Dyer v. Wilbur*, 48 Id. 287. And the Illinois statute provides that "where one or more joint tenants, tenants in common or coparceners in real estate, or any interest therein, shall take and use the profits or benefits thereof, in greater proportion than his, her, or their interest, such person or persons, his, her, or their executors and administrators, shall account therefor to his or their co-tenant jointly or severally:" R. S. Ill. 1874, c. 2, sec. 1; see *Hawley v. Burd*, 6 Ill. App. 454.

It is well established by the great preponderance of the authorities, both English and American, that each tenant in common, or joint tenant, has the

right to enter upon and hold exclusive possession of the common property, and to make such profit as he can by the proper cultivation or use thereof, and to retain the whole of the benefits derived from such cultivation or use, provided that, in keeping the possession and in making the profits, he has not been guilty of an ouster of his co-tenant, nor hindered him from entering upon the premises and enjoying them as he had a right to do. The reasoning upon which the doctrine of these authorities rests is thus stated by Freeman: "As each co-tenant has, at all times, the right to enter upon and enjoy every part of the common estate, this right cannot be impaired by the fact that another of the co-tenants absents himself, or does not choose to claim his right to an equal and common enjoyment; it would be inequitable to compel a co-tenant in possession to account for the profits realized out of his skill, labor, and business enterprise, when he has no right to call upon his co-tenant to contribute anything towards the production of these profits, nor to bear his proportion, when, through bad years, failure of crops, or other unavoidable misfortune, the use made of the estate resulted in a loss instead of a profit to the one in possession:" Freeman on Cotenancy and Partition, sec. 258; *Newbold v. Smart*, 67 Ala. 326, 331; *Terrell v. Cunningham*, 70 Id. 100; *Wilkinson v. Stuart*, 74 Id. 198, 204; *Scantlin v. Allison*, 32 Kan. 376; *Chapin v. Fox*, 75 Ill. 230; *Sconce v. Sconce*, 15 Ill. App. 169; *Crane v. Waggoner*, 27 Ind. 52; *Sears v. Sellers*, 28 Iowa, 505; *Reynolds v. Wilmoth*, 45 Id. 693; *Beanel v. Beanel*, 23 La. Ann. 150; *Balfour v. Balfour*, 33 Id. 297; *Colburn v. Mason*, 25 Me. 434; *Sargent v. Parsons*, 12 Mass. 149; *Shepard v. Richards*, 2 Gray, 424; *Peck v. Carpenter*, 7 Id. 283; *Israel v. Israel*, 30 Md. 120; *Everts v. Beach*, 31 Mich. 136; *Kean v. Connelly*, 25 Minn. 222; *Hause v. Hause*, 29 Id. 252; *Ragan v. McCoy*, 29 Mo. 356; *Hutton v. Powers*, 38 Id. 353; *Webster v. Calef*, 47 N. H. 289; *Isard v. Bodine*, 11 N. J. Eq. 403; *Carr v. Passaic etc. Co.*, 22 Id. 85; *Barrell v. Barrell*, 25 Id. 173; *Woolever v. Knapp*, 18 Barb. 265; *Wilcox v. Wilcox*, 48 Id. 327; *Scott v. Guernsey*, 60 Id. 163; *Joslyn v. Joslyn*, 9 Hun, 388; *Roseboom v. Roseboom*, 15 Id. 309; *Kline v. Jacobs*, 68 Pa. St. 57; *Nell v. Shackelford*, 45 Tex. 119; *Osborn v. Osborn*, 62 Id. 495. In *Wilkinson v. Stuart*, 74 Ala. 204, Briekell, C. J., delivering the opinion of the court, said: "The rule is well settled that a friendly occupancy of the common estate by one tenant does not render him liable to account for rents and profits." And Stone, J., delivering the opinion of the court in *Newbold v. Smart*, 67 Id. 331, said: "Tenants in common are seised *per my et per tout*. Each has an equal right to occupy; and unless the one in actual possession denies to the other the right to enter, or agrees to pay rent, nothing can be claimed for such occupation. Such possession by one is treated as had with the consent and approbation of the co-tenant." But in *Shiels v. Stark*, 14 Ga. 437, and in *Thompson v. Bostick*, 1 McMull. Eq. 75, it was held that one co-tenant occupying the whole of the common estate, though he does not deny the right of his co-tenant to enter and enjoy it in common with him, is bound to account for the value of such occupation.

WHERE OCCUPYING TENANT HAS ACTUALLY RECEIVED RENTS and profits from a third person, all the authorities agree that he must account therefor to his co-tenant: Freeman on Cotenancy and Partition, sec. 273; *Pope v. Harkins*, 16 Ala. 324; *Barnum v. Landon*, 25 Conn. 152; *Huff v. McDonald*, 22 Ga. 161; *Crow v. Mark*, 52 Ill. 332; *Scantlin v. Allison*, 32 Kan. 376; *Bridgford v. Barbour*, 80 Ky. 529; *Buck v. Spofford*, 31 Me. 34; *Gowen v. Shann*, 40 Id. 56; *Moses v. Ross*, 41 Id. 360; *Shepard v. Richards*, 2 Gray, 424; *Sargent v. Parsons*, 12 Mass. 149; *Isard v. Bodine*, 11 N. J. Eq. 403; *Davidson v. Thompson*, 22 Id. 83; *Osborn v. Osborn*, 62 Tex. 495.

MODE OF TAKING ACCOUNT.—It is only for the balance due after making allowance for demands properly admitted as counter-claims, that a co-tenant is entitled to recover: Freeman on Cotenancy and Partition, sec. 277; *Shepard v. Richards*, 2 Gray, 427. Expenses for necessary and proper repairs and moneys paid for taxes are to be deducted from the amount of the rents and profits: *Davidson v. Thompson*, 22 N. J. Eq. 83; *Hannan v. Osborn*, 4 Paige, 343; *Deck's Appeal*, 57 Pa. St. 472; Freeman on Cotenancy and Partition, sec. 278. In reference to the allowance for improvements, Freeman says: "Under what circumstances and to what extent improvements may be considered in taking an account between co-tenants cannot be stated with desirable precision. It is probable, however, that they will not be made a subject of compensation unless they are of a usual character, and are necessary for the ordinary and economical use of the property. But when the property is intended by the co-owners to be devoted to a special purpose, allowance may be made for such improvements as intelligent and sagacious men know will greatly tend to accomplish the purpose desired:" Freeman on Cotenancy and Partition, sec. 279. In the case of *Scantlin v. Alben*, 32 Kan. 379, Valentine, J., delivering the opinion of the court, said: "We think it is eminently proper for the court, in giving compensation to one tenant in common for rents and profits received by another tenant in common, to deduct a proportionate amount for any necessary and proper improvements made by the co-tenant in possession, and the same with respect to any taxes paid by such co-tenant over his proportionate share." But the tenant in common in possession is not entitled to compensation for his improvements, from his co-tenants who have not assented to his making them: *Ford v. Knapp*, 31 Hun, 522; *Coakley v. Mahar*, 36 Id. 157; *Scott v. Guernsey*, 60 Barb. 163; S. C. on appeal, 48 N. Y. 106. In *Graham v. Pierce*, 19 Gratt. 38, it was decided that although, as a general rule, where one tenant in common occupies and uses the common property to the exclusion of his co-tenants, the best measure of his accountability to his co-tenants may be their shares or proportions of a fair rent of the property, yet there may be peculiar circumstances in a case making it proper to resort to an account of the issues and profits as a mode of adjustment between the tenants in common. And in that case it was held that in the case of a tenancy in common in lead mines, an account of the issues and profits is the proper mode of adjustment. The occupying tenant is liable only for the fair value of the property in the condition in which it was when it went into his possession. His co-tenants are not entitled to the benefit of the issues and profits made by the application of his skill and capital upon the common property: *White v. Stuart*, 76 Va. 567, citing the principal case.

THE PRINCIPAL CASE IS DISTINGUISHED in the following cases: *Graham v. Pierce*, 19 Gratt. 39; *Buchanan v. King*, 22 Id. 423; *Newman v. Newman*, 27 Id. 722.

CASES
IN THE
SUPREME COURT
OF
WISCONSIN.

ROCK RIVER BANK v. SHERWOOD.

[10 WISCONSIN, 289.]

MONEY ADVANCED ON CHECKS OF ONE WHO HAS OVERDRAWN HIS ACCOUNT will be regarded as an ordinary loan.

CORPORATION CAN MAKE NO CONTRACT NOT NECESSARY, either directly or indirectly, to enable it to answer the purpose of its creation.

CONTRACT OF CORPORATION, FOREIGN TO PURPOSE or object of its creation, is void.

BANK LIMITED TO TAKING TEN PER CENT INTEREST ON LOANS may discount a note at twelve per cent, without rendering the contract void.

WHEN BANK RESERVES GREATER INTEREST THAN CHARTER ALLOWS, the usury laws apply to the contract, although the rate does not exceed the rate prescribed by such usury law.

INTEREST ON USURIOUS CONTRACT MAY BE RECOVERED, unless the party affected by the usury sets up the usury in his answer, and tenders the principal sum.

ACTION on promissory note. Defendant Sherwood had overdrawn his account at the bank. Upon settlement, he gave his note for the amount so overdrawn, together with ten per cent on the same from the time the money was received to the date of making the note. The note was made payable forty days after date, and was to draw twelve per cent interest after maturity. Defendant failed to pay the note, and the bank brought this action. The answer admitted the making of the note, but set up that the bank had no authority to enter into such a contract, and asked that the note be declared void. The court found the bank entitled to the face of the note, with ten per cent interest thereon from the time the note became due. Defendant appealed.

Todd and Rockwell, for the appellant.

Mat H. Carpenter, for the respondent.

By Court, COLE, J. We should probably be refining too much upon the real nature of the transaction mentioned in the pleadings in this case, were we to hold that the note in question was not, in fact, given by the appellant for a loan of money by the bank to him. It appears from the facts in the case, that Sherwood had been doing business with the bank, and had overdrawn his account, and that upon a settlement between him and the bank, he gave his note for such indebtedness, which note was made payable forty-five days from date, with interest at the rate of twelve per cent per annum after due. The bank, upon this settlement, charged the usual rate of interest on the amount advanced upon the checks of the appellant, and undoubtedly regarded it as an ordinary loan to one of its customers, who had overdrawn his account. At all events, we are disposed so to consider it; and in that light, shall examine the legal consequences flowing from the transaction.

And the first question presented is as to the power of the bank to make this contract. It is insisted by the counsel for the appellant, that as this contract was made by a bank which, by the laws of this state, was only authorized to demand and receive a rate of interest not exceeding ten per cent, upon any loan made by it, that therefore the contract was void for want of capacity in the bank to make it. This objection renders it necessary to refer to the power granted to banks organized under chapter 71 of the revised statutes of 1859, the general banking law of the state. The first three sections of that act refer more particularly to the steps to be taken, and the manner of organizing a bank. Section 4 of the chapter provides that "such association shall have power to carry on the business of banking, by discounting bills, notes, and other evidences of debt; by receiving deposits; by buying and selling gold and silver bullion, foreign coin, and foreign and inland bills of exchange; by loaning money on real and personal securities; and by exercising such incidental powers as may be necessary to carry on such business." Section 8 declares that it shall be lawful for such association to purchase, hold, and convey real estate, for certain purposes therein specified, and contains an absolute prohibition upon the association from purchasing, holding, or conveying real estate in

any other case, or for any other purpose whatever. By section 15, it is provided that "such banks or banking associations may demand and receive for loans on real and personal securities, or for notes, bills, or other evidences of debt discounted, a rate of interest not exceeding ten per cent per annum, until the first day of January, 1860;" but no penalty or forfeiture is provided or declared in the law in case a bank takes more than ten per cent interest.

It is believed that the above are all the provisions of the banking law having a direct bearing upon the point under examination. In order to have the whole question before us, it may be as well to refer in this place to the general statute upon the subject of usury. Sections 1 and 2 of chapter 55, Sess. Laws 1856, read as follows:

"Section 1. All bonds, bills, notes, assurances, conveyances, and all other contracts or securities whatever, whereby there is reserved or secured a rate of interest exceeding twelve per cent, shall be valid and effectual to secure the repayment of the principal sum loaned, but no interest shall be recovered on such securities, or on any money or other thing loaned by such contract.

"Section 2. Whenever any person shall apply to any court of this state to be relieved in case of a usurious contract or security, or when any person shall set up the plea of usury in any action or suit instituted against him, such person to be entitled to such relief or the benefit of such plea shall prove a tender of the principal sum of money or thing loaned to the party entitled to receive the same."

It is at once apparent that the bank reserved upon this note a greater rate of interest than it was authorized to receive for any loan by the banking law, though it did not exceed the rate which a person is permitted to reserve by special contract, under the general usury law. And the question arises, Is the note void for the reason assigned—that the bank had no power to make such a contract?

Angell & Ames, in their work upon corporations, 270, section 256, in discussing the question as to what contracts in general incorporated companies may make, say: "And here we would observe that a corporation and individual stand upon very different footing. The latter, existing for the general good of society, may do all acts, and make all contracts which are not, in the eye of the law, inconsistent with this great purpose of his creation; whereas the former having been

created for a specific purpose, not only can make no contract forbidden by its charter, which is, as it were, the law of its nature, but in general can make no contract which is not necessary, either directly or indirectly, to enable it to answer that purpose:" *Pennsylvania, Del., and Md. Steam Nav. Co. v. Dandridge*, 8 Gill & J. 248 [29 Am. Dec. 543].

And it is a familiar principle which runs through all the law upon this subject, that a corporation is not only incapable of making contracts which are forbidden by its charter, but in general it can make none which are not necessary, either directly or indirectly, to effect the objects of its creation. So when a corporation undertakes to make a contract entirely foreign to the purpose and objects of its creation, such contracts are void. Illustrations of this rule are abundant. In the recent case of *Madison, W. & M. Plank Road Co. v. Watertown & P. Plank Road Co.*, 7 Wis. 59, where the former company, which was authorized by its charter to construct a road from Milwaukee to Madison; and after having constructed the same to Watertown, determined to leave the field west of that place temporarily to the other company, which had a charter for building a road westwardly along the route, nearly identically with that through which the complainants were authorized to extend their road; and the complainants signed a guaranty for the purpose of enabling the defendants to borrow money with which to construct a road westwardly, etc.—this court held the contract of guaranty void, as being entirely foreign to the object of the corporation, and without the general scope of its authority.

So an insurance company, which by its act of incorporation was authorized to insure buildings and personal property against fire, and to make all kinds of marine insurance, and to loan money on bottomry, *respondentia*, or mortgage of real estate or chattels real, with a restriction that it should not exercise banking powers, loaned money on a promissory note, and indorsed the same; it was held that the act was unauthorized, and impliedly forbidden by its charter: *New York Firemen's Ins. Co. v. Ely*, 2 Cow. 678; and cases cited in the notes to Angell & Ames on Corporations, 272-276.

These examples are quite sufficient to illustrate the rule, and show the application of the doctrine in a case where a corporation attempts to make a contract entirely foreign to the purpose and object of its creation, and beyond the scope of the authority granted in its charter. Does the present case fall

within that class of decisions? Here the bank, it is conceded, had full and ample power to discount promissory notes, loan money, etc., and conduct a general banking business, but it could only reserve ten per cent interest upon its loans. It is not a case where a corporation usurps a power not given by its charter, but where, in the exercise of a lawful power and in conducting its legitimate business, it has exceeded the limits fixed by law. Had the note been given, drawing ten per cent interest, after it became due, there could have been no question as to the validity of the contract. But the objection is, that the bank had no authority to discount a note at a greater rate of interest than the general banking law allowed; and if it does, the note is void for want of such power. Is this objection sound? I think not. And yet it must be admitted that there are a number of cases which appear to sustain this position: *Bank of United States v. Owens*, 2 Pet. 527; *Bank of Chillicothe v. Swayne*, 8 Ohio, 252 [32 Am. Dec. 707]; *Creed v. Commercial Bank of Cincinnati*, 11 Id. 489; *Spaulding v. Bank of Muskingum*, 12 Id. 544; *Orr v. Lacey*, 2 Doug. (Mich.) 230, are cases where this question as to the effect of a bank discounting a note at a greater rate of interest than is allowed by its charter is discussed; and some of them hold distinctly that the contract is void, for want of capacity in the bank to make it.

I am not prepared to follow these decisions. In my judgment, the reasoning of these cases is clearly, successfully, and completely answered by the opinions given in *Commercial Bank of Manchester v. Nolan*, 7 How. (Miss.) 508; and *McLean v. Lafayette Bank*, 3 McLean, 587. Mr. Justice Clayton gave an exceedingly able and elaborate opinion in the first case, in which the case of *Bank of United States v. Owens*, 2 Pet. 527, is carefully examined and reviewed; while the doctrine of the Ohio cases is vigorously assailed, and to my mind completely overthrown. In the case of *McLean v. Lafayette Bank*, 3 McLean, 587, Mr. Justice McLean, in considering the effect upon the contract of a bank taking usury, and meeting the objection that such a contract was void for want of power of the bank to make it, uses the following language (p. 611): "Now, here is a capacity imparted to do everything which a natural person could do in relation to the business specified. The natural persons who compose the corporation are authorized to do, in their aggregate capacity, what each one might do in his natural capacity. Now, what is the difference between the natural and

artificial capacities here spoken of? It is admitted that an artificial person has no power to violate the law of its creation, or any other law. Has a natural person power to violate the law? We suppose not; and in this respect no difference is perceived between the two capacities. It is not a question of capacity, but of prohibition. A natural person is prohibited from taking more than six per centum per annum interest. If it were not for the prohibition, he might agree for any reasonable rate of interest. And if the bank had not been prohibited in like manner, might it not have charged in the same way? Is there any doubt of this? It has power to loan money on interest, and no rate of interest being established by law, may it not contract for the rate of interest as a natural person? If it may not do this, it may do nothing; the prohibition in the charter acts upon the artificial capacity, as the general law of the same import acts upon the natural capacity of every citizen."

Again he says, while endeavoring to show that a bank and an individual occupy the same ground as to taking usury: "Neither can have any implied power to make a contract in violation of law; and the argument that a bank can do nothing for the doing of which power is not given, while an individual may do anything which is not prohibited, is without force, because it can have no application to the case. The act is prohibited alike to the bank and the individual. On what principle, then, can the distinction be sustained? As has been shown, the bank has the same power, under its charter, to make a contract for the loan of money as an individual, and if more than six per centum per annum had not been prohibited, it might have charged more."

It seems to me that this reasoning fully meets the objection that this note is void because the bank reserved a greater rate of interest than it was authorized to take. But what are the consequences of this act? We leave out of view now the question as to whether a bank would forfeit its franchises by reserving more interest than it is permitted to take by the general banking law; or whether such an act would be a good ground of forfeiture of its banking privileges in a direct proceeding instituted by the state for a misuser of its franchises. This case does not call for the expression of any opinion upon that point, and of course none will be given. The banking law does not declare what shall be the consequence of taking more interest by a bank than is allowed by the banking law. It is

an undoubted violation of that law, which is the charter for every bank, to reserve upon any loan more than ten per cent interest. But as there is no penalty affixed in the banking law for a violation in this respect, we must look to the general, common, or statutory law to ascertain the consequences of its violation. And in the first place, we suppose that the act of the bank in taking excessive interest must be viewed precisely as an act of an individual: *Planters' Bank v. Sharp*, 4 Smed. & M. 75 [48 Am. Dec. 470]; *Grand Gulf Bank v. Archer*, 8 Id. 151; *Veasie Bank v. Paulk*, 40 Me. 109; *Philadelphia Loan Company v. Towner*, 13 Conn. 249.

The statute of 1856 is very general in terms, and I cannot perceive why it does not apply to corporations as well as natural persons. It was argued by counsel for the bank that this note was not affected by the statute of 1856; for although the rate of interest reserved was greater than the bank by the banking law was permitted to take, still that it did not exceed the rate which parties might contract for under this general statute. But we are of the opinion that when a bank reserves a greater rate of interest than is allowed by its charter, the usury law applies to it, although it does not exceed the rate prescribed by such usury law. The general usury law is to that extent modified by section 15 of the bank law, and that section takes the place, as far as it is applicable, of the statute upon usury. Now, it will be seen that the only penalty prescribed by the statute of 1856 for taking usury is the loss of all interest. The first section provides that the contract or security shall be valid and effectual to secure the repayment of the sum loaned, but no interest shall be recovered upon such security. I have had some difficulty in putting a satisfactory construction upon this statute. Were the first section standing alone, I should then think that the judgment of the circuit court must be reversed, upon the ground that interest was given upon the note after it became due at the rate of ten per cent per annum. But under the pleadings in this case, I am inclined to the opinion that this was proper. The appellant does not set up usury in his answer, but alleges that the bank had no authority or power to take the note, or to enter into any contract for more than ten per cent interest, and asked that the note be declared void. This was raising the question of the power of the bank to make the contract, insisting that it had no such power, and that the contract was void upon that ground. It is not claimed that the contract

was usurious, but void for want of capacity of the bank to make it. Now, it appears to me that the first section of this statute is qualified and restricted by the provisions of the second section, and that they must both be construed together; and I therefore think that the interest upon a usurious contract may be recovered, unless the party affected by the usury applies to the court to be relieved therefrom, or sets up the usury in his answer; in which case, to be entitled to any relief, or the benefit of his defense, he must prove a tender of the principal sum loaned. Suppose a party sets up usury in his answer, but fails to prove any tender of the principal sum, will the court give him the benefit of his defense? Obviously not, because the statute says that he must prove a tender of the principal sum as a condition of having the benefit of that defense.

And in case the defendant fails to prove a tender, what would the plaintiff be entitled to recover? I think the principal and interest. If the first section of the statute is alone considered, disconnected from the provisions of the second section, it would seem to require that the court should, upon its own motion, refuse to give judgment for any interest upon a usurious contract, whenever it was made to appear that such usury had been taken. I cannot think that the legislature intended any such result as that a party setting up the usury in his answer, but failing to prove a tender of the principal sum, should be in a worse condition than one who did not set it up at all. Yet such would be the consequence, unless it is held that a plaintiff may recover principal and interest, when the usury is not set up in the answer, and a tender of the principal sum proved on the trial.

The conclusion at which I have arrived is, that the judgment of the circuit court is right, and must be affirmed.

CONTRACT BY CORPORATION, FORBIDDEN BY CHARTER OR BY STATUTE, IS VOID: See extended note to *Leavitt v. Palmer*, 51 Am. Dec. 341; extended note to *New York Firemen Ins. Co. v. Ely*, 13 Id. 108; notes to *Old Colony R. R. Corp. v. Evans*, 66 Id. 405; *Tracy v. Talmadge*, 67 Id. 132.

BANK DISCOUNT, THOUGH BEYOND LAWFUL INTEREST, IS NOT ALWAYS USURIOUS. This subject is referred to in the note to *Davis v. Garr*, 55 Am. Dec. 394.

RESERVATION OF ILLEGAL RATE OF INTEREST DOES NOT PREVENT recovery of the principal and legal interest thereon: *Philadelphia etc. R. R. Co. v. Lewis*, 75 Am. Dec. 574.

DEFENSE OF USURY: See extended note to *Davis v. Garr*, 55 Am. Dec. 398. It is a personal defense: *Id.*; *Stephens v. Muir*, 65 Id. 764.

THE PRINCIPAL CASE WAS CITED in each of the following authorities, and to the point stated: The principal case was summarized in *Germantown Farmers' Mut. Ins. Co. v. Dhein*, 43 Wis. 426, and it was there held that while contracts of corporations which they have "no authority" to make may be void, contracts which are within the general scope of their powers, but which are "in excess" of those powers in some particulars, are valid, unless, by reason of such excess, they are against public policy. The principal case was thus approved and followed. Again: acts done by corporations in violation of their charters are not necessarily void; and they may, by such acts, acquire title to property and transmit it to others: *Blunt v. Walker*, 11 Id. 349; *Farmers' and Millers' Bank v. Detroit etc. R. R. Co.*, 17 Id. 376. The provisions of the Wisconsin statute against usury apply as well to banks as to natural persons, the only difference being that the former are restricted to interest at the rate of ten per cent per annum, whilst the latter may receive twelve: *Durkee v. City Bank of Kenosha*, 13 Id. 222; *Brower v. Haight*, 18 Id. 105, 108. Securities, not usurious when given to a natural person, are equally valid when given to a bank; though both such person and bank be without the state, if the contract was made within the state, was to be performed there, and was governed by the laws of such state on the subject of usury: *Kennedy v. Knight*, 21 Id. 347. Where a town insurance company is prohibited by statute from insuring school-houses without a majority vote of the members of the company, a policy of insurance upon a school-house, issued without such vote, is *ultra vires* and void; and a policy so issued upon a dwelling-house becomes void, if afterwards the dwelling-house is converted into a school-house. The doctrine of consent and waiver is not applicable to such a case, because the law makes the restriction of power, and not a mere regulation of the company: *Luthe v. Farmers' Mut. Fire Ins. Co.*, 55 Id. 546. Where any person sets up usury in an action against him, it is not necessary under the statute of Wisconsin to aver in his answer a tender of the principal sum loaned, but he is entitled to the benefit of his defense by proving such tender at any time up to or even by making the tender upon the trial: *Moyer v. Gunn*, 12 Id. 387; *Towles v. Durkee*, Id. 489. In the case last cited, the principal one was summarized and distinguished. In *Towles v. Durkee*, *supra*, the court below misapprehended the principal decision, and sustained a demurrer to an answer, not because the answer failed to show a case of usury, but because it did not aver a tender of the principal sum loaned. But the principal case simply asserts that the defendant, in order to avail himself of usury, should plead it and then prove a tender. It does not hold that he should aver a tender. Besides, usury was not averred at all in the principal case. The bank having contracted for usurious interest, it was claimed that the entire contract was void, not by the usury law, but for want of power on the part of the corporation to make it. It was said to be as void as would be a policy of insurance issued by the bank. On the other hand, it was contended that, inasmuch as the bank was authorized to loan money and take securities, if it contracted for more interest than the law allowed, that had the same effect on the contract as would a similar transaction between individuals. The latter view was sustained, and this was the entire scope of the decision.

NASH v. CHURCH.

[10 WISCONSIN, 303.]

JUDGMENT CANNOT BE AVOIDED OR IMPREACHED BY ATTACKING MERE IRREGULARITIES in judicial proceedings, which are open to direct objection in the suit, or which may be taken advantage of on error or appeal.

JUDGMENT IN PARTITION IS CONCLUSIVE WHEN ATTACKED COLLATERALLY.

In a suit for partition, the finding and determination of a court of general jurisdiction, as to the existence and interests of parties unknown, as well as to the sufficiency of an affidavit authorizing the publication of notice under the statute, is binding in all collateral attacks upon the judgment, especially when the allegations of the complaint, and the statement of facts in the affidavit, are in substantial conformity with the statutory requirement.

ALLEGATION AS TO "UNKNOWN OWNERS" IN ACTION OF PARTITION IS SUFFICIENT if in the following words: "That such portions of said tract as do not belong to defendants and to your orators belong to unknown owners."

UNKNOWN OWNER, PROCEEDED AGAINST BY ADVERTISEMENT, IN ACTION OF PARTITION, IS BOUND BY JUDGMENT THEREIN, though in possession of the premises, claiming in severalty by paramount title, not a party by name, and without actual notice, where the statute makes the judgment binding and conclusive on unknown owners who have been served by publication.

ACTION to recover a lot in the city of Milwaukee. Charles D. Nash commenced this action against Benjamin Church, as owner, and Frederick Buchanan, as tenant. Defendants denied plaintiff's title, and set up title in themselves. Plaintiff showed a patent from the government to a quarter-section of land, including the lot in question, and then put in evidence the record of a suit in partition of such quarter-section. The bill for partition was brought against certain named defendants, and contained the usual allegations, showing the proportion owned or claimed by each, and then declared "that such portions of said tract as do not belong to said defendants and to your orators belong to unknown owners." The court made an order of publication to bring in unknown owners, which was duly published. Afterwards, the court rendered judgment, and set apart to one Ogden the premises in controversy. From Ogden, plaintiff showed a sufficient deed to convey his title. Defendants offered in evidence deeds to show that said Ogden had acquired title to an undivided portion of the said quarter-section, and had conveyed all his title to defendants' grantors before the commencement of the partition suit, and offered to follow such deeds by evidence that defendant Church, for several years prior to the partition suit,

had been in open, notorious, and exclusive possession of the lot, claiming to be the owner thereof in severalty. The court refused to admit this evidence, on the ground that the record and decree in the partition suit were conclusive as to the title of all persons, and defendants could only be allowed to show title under and subsequent to the partition. Judgment for plaintiff, and defendants appealed.

Palmer and Stark, for the appellants.

Emmons, Van Dyke, and Hamilton, for the respondent.

By Court, DIXON, C. J. The positions assumed by the respondent's counsel in the argument of this case, I must say, appeared to me novel and somewhat extraordinary. It seemed to me that if they were correct, we should, so far as the appellants are concerned, be compelled to give one of the most unjust judgments ever pronounced in a court of justice; that every sentiment of equity and justice demanded of us to uphold them in their title and possession, or at least to give them their day in court for the purpose of establishing them. The idea that, under our statute for the partition of real estate, a party in the quiet and undisturbed possession of his property could be stripped of it by a judicial proceeding of which he was entirely ignorant, struck me as being so flagrantly and enormously unjust and oppressive that I thought it could not be the law. The taking of a valid title of a person in possession from him and transferring it to another having no right to it, by a proceeding of which the owner has no knowledge, and in which his title was not directly adjudicated against him, nor the attention of the court directly called to it, exhibits a most alarming defect in justice. Such a proceeding is opposed to all our notions of law and justice, and we search with anxiety for some mode of escape from it. Such were my impressions of this case at the argument, and although I am compelled to adopt the views of the respondent's counsel as the correct law, yet I must confess I have not been able, nor am I desirous, to rid myself of them.

It is not by the rules of the common law, which courts are at liberty to mold and modify so as to meet the ends of justice, but by the declarations of the legislature upon a subject confessedly within their control, that we are to determine this case. They, not the court, are responsible for the unjust consequences which may flow from its decision. They have prescribed the mode in which parties shall be brought into

court, the form of the proceedings, and the effect of the judgment in actions like that under which the respondent claims title. The same power which authorized the wrong must apply the remedy. Our solicitude to save the rights of the appellants has led us to the examination of many cases not cited by counsel, but pressed as I am for time, I shall only notice such as bear most directly on the questions involved.

The first and second objections made by the appellants' counsel to the partition proceeding, viz., that the allegation in the complaint, as to the existence and interests of parties unknown, was insufficient, and the affidavit was not sufficient to authorize the order of publication, are clearly untenable. The court was a court of general jurisdiction; and its finding and determination of these matters is binding and conclusive in all collateral proceedings. The allegations of the complaint and the statement of facts in the affidavit were a substantial compliance with the statutory requirement. Mere irregularities in judicial proceedings, which are open to objection directly in the suit, or might be taken advantage of on error or appeal, cannot be drawn in question collaterally, for the purpose of avoiding or impeaching the judgment: *Painter v. Henderson*, 7 Pa. St. 48; *Doe v. Smith*, 1 Ind. 451; *Foot v. Stevens*, 17 Wend. 488; *Hart v. Seixas*, 21 Id. 40.

The next and most important question is, whether the appellant Church, who was, at the time of the commencement and consummation of the suit for partition, an owner in severalty, and in possession of a portion of the partitioned premises, and who was not made a party to the suit by name, or served with process, is bound by the judgment as one of the "unknown owners," who were proceeded against by advertisement. I confess that we should have had great doubt about holding him a party to the suit as an unknown owner, and therefore, bound by the judgment, were it not for the authority of the case of *Cook v. Allen*, 2 Mass. 461. The case is so directly in point, the decision by a court of so great respectability and learning, and the reasoning so conclusive, that we are compelled to adopt and be governed by it. The leading facts were like those in the present case in almost every particular. The suit was by writ of entry *sur disseisin*. The action was tried at the May term, 1807. Cook, the demandant, in support of the action, gave in evidence the proceedings of the supreme court, upon a petition of Joseph S. Reed for partition, in the year 1800, wherein he asked to have one thousand acres of

land set off to him in severalty, out of a tract of nineteen thousand acres, which one thousand acres he alleged he held in common and undivided with others to him unknown. Upon the petition, the court ordered notice thereof to be given to all persons interested to appear and show cause why the prayer thereof should not be granted, pursuant to the provisions of a statute passed in 1784. The order was executed, and no person appearing, partition was decreed and made.

It was shown that the land demanded in the action, and to which Allen, the tenant, had pleaded *nul disseisin*, was assigned to Reed by the commissioners appointed by the court to make partition, and that Reed had conveyed the same to the demandant. Allen set up title under one Jonathan Frye, who entered upon it upwards of thirty years before, and continued to hold and occupy it until Allen recovered seisin and possession, by virtue of a mortgage made by Frye to him in 1787, and which he had foreclosed, and ever since possessed the same. Upon the argument in that case, as in this, it was urged that the operation of the statutes was confined to the co-tenants, who were estopped, after due service of process under the statute, from contesting the share or property claimed by the petitioner; that the object of the act, and of the process under it, was merely to turn an estate in common into an estate in severalty; that neither the one nor the other were ever considered as furnishing a method of establishing or trying the right of a tenant in common, as against one holding a title adverse to that of the tenants in common. It was further argued that a judgment of a court binds only parties and privies; that Allen was no party to the judgment, for he claimed nothing as tenant in common; that if he had been named in the petition as a person interested in the land, and personal notice given him, there might have been a pretense for considering him as a privy. But that the whole purpose of the process being to effect a partition of the estate held in common, the tenants in common were the only parties to the process, and notice to all parties interested must be understood to imply notice to the co-tenants alone. The court remarked that a writ of partition at common law must name all the tenants as plaintiffs or defendants, and set forth the shares of each; and that partition must be made among all. That in that state large parcels of land were holden in common, the tenants were numerous and unknown to each other, and their shares unascertainable; and that partition so neces-

sary for the settlement and cultivation of lands was therefore impracticable by writ at common law. After noticing the provisions of the English statute 8 & 9 Wm. III., c. 31, designed to remedy like inconveniences, and that of their own state, which declared that "the final judgment should be valid to all intents and purposes," and observing that these words were equivalent to those of the English statute, which declared "it should be good, and conclude all persons, whatever right or title they had in the premises," the court, by Parsons, C. J., say: "It is reasonable to give the words a construction, by which no person shall be concluded by a partition, where he could not by law be admitted to defend his rights. This construction is conformable to the maxim of the common law, that judgments do not bind the rights of any but parties or privies—understanding by parties all persons who may have been parties on the record but from their own laches.

"In applying this construction to the statute before us, where in the petition certain persons are named as the co-tenants, if partition be made, none are concluded by it but the persons named, their heirs and assignees. If in the petition the co-tenants are not named, but are supposed to be persons unknown to the petitioner, and notice is given to all persons interested to appear and show cause against the petition, and partition be made, no person appearing, this partition shall conclude all persons whatever as to their rights of possession. Any person interested was authorized to appear, and by falsifying any allegation of the petition in a point material to his defense might have protected his interest. But if he will lie by and refuse to appear, it is a consent that the petitioner may proceed *ex parte*, and he shall be bound by the partition as fully as if he had appeared and afterwards made default.

"In a writ of partition, the plaintiff alleges that all the parties to the writ hold together and undivided; so in the petition, where the tenants are not known or named, the petitioner, by declaring that he is seised of an undivided share of the land, in effect alleges that all persons holding the land, or any part of it, are seised as co-tenants with him. And when judgment is rendered in partition, all the allegations material to the rendition of the judgment are to be considered as facts, and all persons concluded by the judgment are estopped from controverting them. In this case, therefore, Allen, the tenant,

cannot be admitted, by showing a disseisin of all the tenants in common, to question the right of Reed, alleged in his petition, and supported by the judgment, as he cannot be considered a stranger to the record, and so not bound by it."

To the other objection, that by a true construction of the statute the right of possession of no person is, in fact, bound by any proceeding under it but a tenant in common, they say: "It is a sufficient answer to this objection, in this case, that the tenant, having been notified of the petition, in which it appears that the petitioner claimed to hold with him, together and undivided, the premises, and having a legal right to appear and controvert the petition, and judgment being rendered on his default, he is now concluded from saying that he is not a tenant in common. . . . As the statute contemplates a case where the parties are unknown, it must extend to a case where the particular interests or rights of the parties are unknown. It is therefore enough for the petitioner to show his own right, not being cognizant of the rights of the others. And the showing of his own right to be an undivided interest in all the land amounts to an allegation that all the persons holding the land, or any part of it, hold together and undivided with him. If any man holding the land, or any part of it, by sole seisin, is named a defendant in a writ of partition at common law, or in a petition on the statute, and after service of the process is defaulted, there can be no doubt that his right of possession would be concluded by the judgment. In this case, the tenant being described by his interest in the land, according to the petitioner's claim of title, and process being served on him, if he be not bound by the judgment, the remedy, where most necessary, and where the mischief is irremediable at the common law, would be, at the least, useless."

I have quoted at some length from this opinion, partly because it was not noticed at the trial, but more for its sound reasoning, and because the necessity and policy of the law in providing for proceedings against property of persons unknown is clearly shown. If judgments in such proceedings are not to be held binding and conclusive on all such persons having an interest both as to the amount and nature of their interests, like other judgments, then the mischiefs to be remedied cannot be reached, and partition in many cases becomes an impossibility. The law makes the allegation that they are unknown, and publication of notice equivalent to a suit against them by name where they are known, and personally served

with process. If the defendant Church had been sued by name and served with process, and had made default, no one can doubt that such default would have been a confession by him according to the allegations of the complaint, that he was a tenant in common. The statute gives precisely the same effect to the proceeding in the form in which it was had. The good faith of the complainants in the partition suit is not denied. No fraud or design on their part in omitting to name him as a party and serve him with process is alleged. The whole proceeding seems to have been fair on their part, and his omission as a direct party the result of ignorance or mistake.

A specific reference to the provision of our statute is unnecessary. It is sufficient, generally, to say that the complaint, which must be verified by oath, shall particularly describe the premises sought to be divided, and set forth the rights and titles of all persons interested therein, so far as the same shall be known to the plaintiff; that he is required to exhibit before, and the court to take proof of his title; that upon the hearing of the cause the court shall ascertain from the proofs taken, in case of failure to answer the complaint, and declare the rights, titles, and interests of the parties to such proceedings, plaintiffs as well as defendants, so far as the same shall have appeared; and shall determine the rights of the said parties in such lands, and render judgment that partition be made according to such rights; and that such judgment shall be binding and conclusive: 1. On all parties named therein, etc.; 2. On all persons interested in the premises who may be unknown, to whom notice shall have been given by personal service, or by publishing the same as thereinbefore directed; and 3. On all persons claiming from such parties or persons, or either of them. From these provisions, the requirement that the court determine the title and the conclusive effect of the judgment are evident.

The hardship of the present case arises from the omission of our legislature to do what that of Massachusetts, Maine, and many other states have done, namely, to provide that the rights of those persons unknown, who have not appeared and answered, and who claim by paramount title, or to hold in severalty the whole or any part of the premises mentioned in the complaint, shall be excepted from the conclusive operation of the judgment. For the sake of justice to these defendants, it is to be wished that such exception had been made. It will be observed in the case above cited that the conclusiveness of

the judgment as to the right of possession only is affirmed. The action being by writ of entry, the right of possession alone was contested. The effect of the judgment as to Allen was only to sever the possession and put Reed and his assigns in. The court expressly said that he was still at liberty to assert his paramount or several title by writ of right: See R. S. Mass., 1836, c. 103, sec. 38; *Pierce v. Oliver*, 13 Mass. 211.

In addition to the cases cited by the respondent's counsel, showing the conclusive effect of the judgment of partition upon the right, *Herr v. Herr*, 5 Pa. St. 428 [47 Am. Dec. 416], and *Doe v. Smith*, 1 Ind. 451, may be referred to as directly in point. In *Herr v. Herr*, *supra*, it was held that a decree of partition by the orphans' court of Pennsylvania was necessarily as conclusive of the right as a judgment of partition in a court of law, although the orphans' court had no jurisdiction whatever to try the title, if an adverse claim was made; whilst in a court of law, the title might be put in issue, and be found by the judgment. In that case, a party having no title under the intestate petitioned for an inquest, alleging a title as tenant in common, which was not disputed by the real heirs. Upon this allegation, a decree of partition was made. The court say that the joint tenure was established by the judgment, *quod partitio fiat*, and was conclusive when coming collaterally into contest between the same parties in a subsequent proceeding. The authority of this case may be considered as somewhat shaken by the subsequent case of *McClure v. McClure*, 14 Pa. St. 134, decided by the same court. I do not myself clearly see how they can be reconciled, and yet the doctrine of *Herr v. Herr*, *supra*, is expressly acknowledged and sanctioned. I think *McClure v. McClure*, *supra*, is one of those favorable cases which make bad precedents. It cannot be supported on the doctrines which the court profess to hold. Somewhat opposed to these cases are *Tabler v. Wiseman*, 2 Ohio St. 207, and *Grice v. Randall*, 23 Vt. 239; but comment upon them is deemed unnecessary.

Judgment affirmed.

JUDGMENT OF COURT OF COMPETENT JURISDICTION CANNOT BE COLLATERALLY ATTACKED: See *Lee v. Kingsbury*, 62 Am. Dec. 546, and collected cases in note thereto 549; *Dilling v. Murray*, 63 Id. 385, and note 389; *Horton v. Critchfield*, 65 Id. 701; *Lord v. Chadbourne*, 66 Id. 290; *McCoy v. Morrow*, 68 Id. 578; *Ellis v. Clarke*, 70 Id. 603, and note 605; *Grasmeyer v. Beeson*, Id. 309, and note 313. It is conclusive upon matters actually determined, and also upon matters which the parties might have litigated; and can only be attacked for fraud: See last two cases cited.

CONCLUSIVENESS OF JUDGMENT IN PARTITION: See *Lessee of Pillsbury v. Dugan's Adm'r*, 34 Am. Dec. 427; *Herr v. Herr*, 47 Id. 416; *Mitchell v. Kintner*, Id. 408, and note 413; note to *Williams v. Field*, 60 Id. 434; *Portis v. Hill*, 65 Id. 99. The effect of a judgment in partition is discussed at length in an extended note to *Nichols v. Boyles*, 40 Id. 640-642. Decree of partition cannot be collaterally impeached: See *Grassmeyer v. Beeson*, 70 Id. 309; *Merklein v. Trapnell*, 75 Id. 634.

EFFECT OF NOTICE BY PUBLICATION: See extended note to *Flint River Steamboat Co. v. Foster*, 48 Am. Dec. 272. As to sufficiency of service by publication, see *McGaken v. Carr*, 71 Id. 421; *Frasier v. Steenrod*, Id. 447. This case shows that it cannot usually be called into question collaterally, but there are exceptions to the rule shown therein. Courts have power to determine whether a service of process was sufficient: *Borden v. State*, 54 Id. 217.

THE PRINCIPAL CASE WAS CITED IN each of the following cases and to the point stated: Irregularities cannot be taken advantage of collaterally to impeach a final judgment; as, in a case where the proceedings of a board of supervisors are of a judicial character, and having jurisdiction, such board attempt to remove their clerk under a statute authorizing them to do so. If they make the proper order and a final adjudication in the case, mere irregularities in the proceedings cannot be taken advantage of collaterally, as upon *quo warranto*: *State v. Prince*, 45 Wis. 613. A judgment in partition, it is said in *Martin v. Titeworth*, 10 Id. 330, where the proceedings are regularly had against unknown owners, is conclusive as to title of the partitioned premises, as against all the world. *A fortiori* it must be held conclusive as against all persons who were made parties and brought in by name. The title or interest of all persons, parties to the action, and their legal representatives, and of all persons claiming under them, except tenants, or persons having claims as tenants in dower, by the curtesy or for life, to the whole of the premises which are subject to the partition, is bound by the judgment: *Deery v. McWhinock*, 31 Id. 204. A partition suit is not designed as a substitute for ejectment to try conflicting titles, and a court will not proceed to a partition until the title is settled; and when the court does proceed to a partition, it must therefore adjudge that the title has been settled, and the parties ought to be concluded by it. The object of partition proceedings is to make division among tenants in common, and where an unknown owner is properly made a party, a decree in partition not only binds his interest as a tenant, but precludes him from showing a paramount title in severalty to any part of the partitioned premises. If any party claims the whole or any part of such premises in severalty, it is his duty to set up that fact to defeat or suspend the partition proceedings until that question can be determined: *Kane v. Rock River Canal Co.*, 15 Wis. 187, 188. Every point which has been, either expressly or by necessary implication, in issue, and has been decided, or which must necessarily have been decided, in order to support a judgment or decree, is concluded by it: *Board of Supervisors v. Mineral Pt. R. R. Co.*, 24 Id. 125. The principal case was distinguished in *Ruth v. Oberbrunner*, 40 Id. 272, where it was said that the principal case rested upon the peculiar provisions of the statute in that class of cases. In *Ruth v. Oberbrunner*, *supra*, it was held that merely giving the statutory notice of the application for the probate of a will, without further notice, would not conclude the heir in respect to the title of real estate under a final order of distribution. The principal case, it was said, could not be invoked in aid of such a claim.

MOHR v. GAULT.

[10 WISCONSIN, 512.]

LAKE CAN BE DRAINED ONLY BY NATURAL OUTLET, for the owners along a creek forming such outlet have a legal right to the natural flow of the waters of the lake through it, and any artificial drain would deprive them of this flow.

OBSTRUCTION OF RUNNING STREAM OCCASIONED BY WASHING DOWN OF ITS BANKS DOES NOT IN LAW CONSTITUTE NUISANCE, unless such obstruction is attributable to the acts or agency of man.

INDIVIDUAL MAY ABATE PRIVATE NUISANCE, if he can do so by peaceable means.

DEFENDANT owned land partly covered by Mud lake, and plaintiffs owned land and a mill on Black Earth creek, the natural outlet of said lake. By reason of the building of a road and the cultivation of land, the stream became obstructed at the outlet of the lake, and the water was raised one and one half feet, and flooded much of defendant's land. He thereupon began to cut a ditch from the north-east end of the lake, nearly opposite Black Earth creek, so that the water might flow into Big Marsh. Plaintiffs brought suit to restrain him. The court permitted him to dig such a ditch as would lower the lake three feet, and plaintiffs appealed.

Abbott, Gregory, and Pinney, for the appellants.

S. Crawford, for the respondent.

By Court, DIXON, C. J. It seems to us that the facts found by the circuit judge do not sustain his conclusions of law. As facts, he finds that Black Earth creek is the natural outlet for the waters of the lake; that at its source it is about six feet wide, and the waters passing out of it about one foot in depth; that it has been filled up about one foot and a half, by reason of a highway on one side and cultivated land on the other, and the washings of the earth therefrom; and that from one end to the other there is no perceptible fall in the lake. As conclusions of law, from these facts and others, touching the defendant's title and occupancy of lands bordering upon and overflowed by the waters of the lake, which we need not here repeat, he finds that the defendant has the right in any way to drain his land, by letting off the surface water of the lake to the depth of three feet, without injury to the natural flow of the lake towards the creek; and that the waters upon the lands of the defendant constitute a private nuisance, which the de-

fendant has the right to abate, in his own way, without committing a breach of the peace.

It is difficult to perceive how the first conclusion is supported by the facts. If there is but one foot of water flowing over the bed of the creek at the point where the waters of the lake enter it, and there is no perceptible fall or difference in the height of the surface of the lake from one end to the other, as was found, and as appears to have been mathematically demonstrated, how can the defendant be permitted, by a ditch turning the waters in an opposite direction, into Big Marsh, to drain the lake to the depth of three feet, without entirely destroying the flow of waters into the creek? Certainly he cannot. The present bed of the creek would then be about two feet above the surface of the lake. If it was reduced one foot and a half, to its original condition, it would still be one half foot above the surface of the water in the lake, after it was so drained.

It may be doubtful, from the facts found, whether, according to the definitions given in the books, the obstructions at the head of the creek, occasioned by the washing of the earth, is or is not a nuisance. If the washing in of the earth was purely accidental, and not directly attributable to the acts of man, it would not be. Blackstone defines a nuisance to be "anything that worketh hurt, inconvenience, or damage," and treats of it throughout as something brought about through human agency. Bishop, volume 2, section 848, says "that all acts put forth by men which tend directly to create evil consequences to the community at large may be deemed nuisances, where they are of such magnitude as to require the interposition of courts." It is not, however, necessary for us to determine here whether this obstruction is or is not a nuisance, for if it is, the defendant's remedy lay in abating it, if he could do so by peaceable means; and if not, he must resort to his action for that purpose. If it is not a nuisance, as defined in the law, but an accidental obstruction, he must either endure it or proceed to remove it; and which, we will not here attempt to say. According to the doctrine laid down in *Prescott v. Williams*, 5 Met. 429, he might, perhaps, remove it, as being necessary to the use and enjoyment of his lands. In neither case has he the right to rid himself of the annoyance by diverting the waters of the lake from their natural outlet. The owners along the creek have a legal right to the natural and usual flow of the waters of the lake through it: and the efforts of the

defendant must be directed to the removal of the obstruction or cause of the backwater, which in law constitutes the nuisance.

The judgment must be reversed, and the cause remanded for further proceedings in accordance with this opinion.

WHILE COURT DID NOT DECLARE WHETHER OBSTRUCTION MENTIONED IN PRINCIPAL CASE was or was not a nuisance, and whether the injured party had to endure it or remove it, it may not be amiss to state that equity may abate as well as prevent the erection of a nuisance, and that equity will not only decree the removal of an obstruction in a watercourse, in a proper case, but also enjoin its future obstruction: *Earl v. De Hart*, 72 Am. Dec. 395, and note thereto 401. A nuisance, also, whether public or private, may be abated at common law, by the party aggrieved, if done without a breach of the peace: *Stiles v. Laird*, 63 Id. 110, and note 113; but the jury must determine from all the circumstances of each particular case what constitutes a nuisance: *Graves v. Shattuck*, 69 Id. 536.

RIPIARIAN PROPRIETOR'S RIGHT TO NATURAL AND UNINTERRUPTED FLOW OF STREAM: See *Dilling v. Murray*, 63 Am. Dec. 385, and collected cases in note thereto 389; *Tillotson v. Smith*, 64 Id. 355, and note 357; *Stein v. Burden*, 65 Id. 394; *Pillsbury v. Moore*, 69 Id. 91.

CITATION OF PRINCIPAL CASE.—In *Larson v. Furlong*, 50 Wis. 688, the court quotes the following language from Shaw, C. J., in *Brown v. Perkins*, 12 Gray, 89: "The true theory of the abatement of a nuisance is, that an individual citizen may abate a private nuisance injurious to him, when he could also bring an action; and also when a common nuisance obstructs his individual right, he may remove it to enable him to enjoy that right, and he cannot be called in question for so doing. As in case of an obstruction across a highway, and an unauthorized bridge over a navigable watercourse, if he has occasion to use it, he may remove it by way of abatement. But this would not justify strangers, being inhabitants of other parts of the commonwealth, having no such occasion to use it, to do the same. Some of the earlier cases, perhaps, in laying down the general proposition that private subjects may abate a common nuisance, did not expressly mark this distinction; but we think, upon the authority of modern cases, where the distinctions are more accurately made, and upon principle, this is the true rule of law." The court, in referring to this doctrine, cited the principal case to show that it had been approved in Wisconsin, at least by implication if not expressly.

ATTORNEY-GENERAL v. FOOTE.

[11 WISCONSIN, 14.]

ANSWER OF NOT GUILTY OR NON USURPavit IS BAD IN QUO WARRANTO.

The defendant must either justify or disclaim the holding.

COURTS TAKE NOTICE OF TIME WHEN PUBLIC STATUTE goes into effect.

EXISTENCE OR TIME OF TAKING EFFECT OF PUBLIC STATUTE CANNOT BE PUT IN ISSUE, or admitted or denied by the pleadings, but must be demonstrated. VOL. LXXVIII—44

terminated by the judges themselves. Accordingly, an allegation in answer to *quo warranto*, that a statute under which the defendant claims to hold office was published and went into effect prior to the day of his alleged election, is not admitted by a demurrer to such answer.

DATE OF CERTIFICATE OF SECRETARY OF STATE APPENDED TO PUBLISHED VOLUMES OF STATUTES will, in the absence of any suggestion which may lead to a more accurate inquiry, be taken to be the date of their publication and taking effect.

INFORMATION filed by the attorney-general averring that the respondent had usurped and held the office of judge of the municipal court of the city and county of Milwaukee, without legal election, appointment, or authority, etc. The defendant filed his answer, to which the attorney-general filed a general demurrer.

James H. Howe, attorney-general, for the state.

H. L. Palmer, for the respondent.

By Court, DIXON, C. J. The demurrer of the attorney-general to the answer of the respondent must be sustained. The first separate defense set up in the answer, that the respondent has not usurped, etc., is bad. It does not answer by what warrant or authority he claims title to the office, which the writ calls upon him to show. He must either justify or disclaim; and not guilty or *non usurpavit* are bad answers: note to *People v. Richardson*, 4 Cow. 118; *People v. Utica Ins. Co.*, 15 Johns. 358.

The defense secondly set up is also bad; for although it is alleged that chapter 199 of the local laws of 1859, entitled "An act to establish a municipal court in the city and county of Milwaukee," was duly published, as required by law, and went into effect before the day on which the respondent claims to have been elected to the office of municipal judge, by virtue of its provisions, yet, as it is a public statute, of which we are bound *ex officio* to take notice, as well as to the time it went into effect as to its provisions, this allegation is not admitted, or to be taken to be true by the demurrer. The existence or the time of the taking effect of a public act cannot be put in issue, or admitted or denied by the pleadings, but must be determined by the judges themselves: *Sedgwick on Stat. & Const. Law*, 34, 118; *Dwarris on Statutes*, 467.

That the act in question is public was determined by this court: *In re Boyle*, 9 Wis. 264. We likewise in that case, as on previous occasions, held that in the absence of any suggestion which might lead to a more accurate inquiry, the date of

the certificate of the secretary of state, appended to the published volumes of the laws, would be taken to be the date of their publication, and taking effect. The certificate is dated June 29, 1859, and we accordingly there held that the act went into operation on that day. No suggestion of any other or prior publication is made in this case; and our conclusion must therefore be the same. The election and qualification of the respondent, at the time alleged in his answer, without warrant of law, were consequently null and void: *Commonwealth v. Fowler*, 10 Mass. 295.

The demurrer must be sustained, and judgment of ouster go against the respondent.

DEFENDANT IN QUO WARRANTO MUST EITHER JUSTIFY OR DISCLAIM: Note to *People v. Rensselaer etc. R. R. Co.*, 30 Am. Dec. 52; see *State v. Harris*, 36 Id. 460.

PUBLIC STATUTES ARE JUDICIALLY NOTICED: *People v. Herkimer*, 15 Am. Dec. 379; *Holley v. Holley*, 12 Id. 342. And courts take judicial notice of the time of their taking effect: *Perkins v. Perkins*, 18 Id. 120.

STATUTES, WHEN TAKEN EFFECT: *Boston v. Cummins*, 60 Am. Dec. 717; *Weeks v. Weeks*, 47 Id. 358; *Perkins v. Perkins*, 18 Id. 120.

LA CROSSE AND MILWAUKEE R. R. Co. v. VANDERPOOL.

[11 WISCONSIN, 119.]

RAILROAD BRIDGE IS NOT BUILDING WITHIN STATUTE GIVING MECHANIC'S LIEN upon "any dwelling-house or other building."

WORD "BUILDING" INCLUDES THOSE STRUCTURES ONLY WHICH HAVE CAPACITY TO CONTAIN and are designed for the habitation of man or animals, or the sheltering of property.

ACTION by Vanderpool to foreclose a mechanic's lien claimed upon the railroad bridge of the plaintiffs in error. On the trial, the defendants objected to the order of the court that the lien of the judgment should attach to the bridge and premises on which it was situated, on the ground that the bridge was not a building within the meaning of the statute. Objection overruled, and judgment entered accordingly. The defendants sued out a writ of error.

Emmons and Vandyke, for the plaintiffs in error.

S. S. Barlow and S. U. Pinney, for the defendant in error.

By Court, PAINE, J. This action was brought to enforce a lien upon the railroad bridge of the plaintiff in error, which

crosses the Wisconsin river, for materials furnished in building the same. Our statute gives a lien for work done or materials furnished in the erection or construction of "any dwelling-house or other building," and the only question in this case is, whether the words "other building" can be construed to include a railroad bridge.

It is conceded that the words of the statute must be construed according to the ordinary and common sense. And the counsel for the defendant in error then cite the definitions of a number of standard lexicographers, which include as buildings structures of various kinds, which are not houses, or designed for the habitation of either men or animals, or the sheltering of property. And it cannot be denied that the words "build" and "building," as a verb and participle, are commonly used as applicable to the erection of numerous structures, which would not be included among any of the last-named classes. Thus we speak of building bridges, building fences, sidewalks, embankments, etc. But notwithstanding this, we think the word "building," as a noun, has a common, well-understood meaning, exclusive of structures of this character, and including only those which have a capacity to contain and are designed for the habitation of man or animals, or the sheltering of property.

We say that things are built which we do not call buildings after they are completed. Thus suppose a witness on the stand should testify that the owner of a certain lot had built a fence upon it. If counsel desired to know if the lot was otherwise vacant, he would not ask if there were any other buildings upon it, but would ask if there were any buildings upon it. And if there were nothing but the fence, the witness, using the language in its ordinary signification, would undoubtedly answer no. Because, although he had spoken of building the fence, yet he would not call it a building, and nobody would ordinarily so consider it. So, if one were asked if there were any buildings on the streets, if nothing but sidewalks were there, he would unhesitatingly answer no, yet might at the next moment speak of building a sidewalk. So when we undertake to state how many buildings there are on any farm or lot, or in any village or town, we are never understood to refer to fences, bridges, or anything of that sort, but only to those structures which have a capacity to contain, commonly included among buildings. And this common idea seems to be strictly correct, according to the most accurate

analysis. In Crabbe's Synonyms, 498, cited by the counsel for the plaintiff in error, the most precise and accurate distinction between the words "build," "erect," and "construct" seems to be stated. It says: "What is built is employed for the purpose of receiving, retaining, or confining; what is erected is placed in an elevated position; what is constructed is put together with ingenuity." And again: "Houses are built, monuments erected, and machines constructed." Such nice distinctions and shades of meaning should never be observed in opposition to the ordinary and common understanding of men, unless the intent of the statute manifestly required it. But here the common meaning of the word "building" as a noun is identical with its most exact signification; and in our opinion, it does not include a railroad bridge or any other bridge.

On the first statement of the question, it seems obviously outside of the intention of the statute. Why include a railroad bridge any more than any other part of the track? It is all a structure built for use. So is a plank road or a macadamized road. And we can see no more reason for including that part of such roads which cross a river among buildings than for including any other part which has required labor and materials in its construction, given by the statute itself to the word "highway." It provides that this word may be construed to include any road legally laid out, etc., and all bridges upon the same. It would certainly seem to be an unwarrantable construction to say that any part of a common highway was intended to be included in the phrase "other building," and made liable to be sold to enforce a mechanic's lien. Yet there is no ground for any distinction between a railroad bridge and any other in this respect, unless it be that the former is more essentially a part of the whole road, and less capable of being severed from it, and therefore would be less likely to have been intended. The statute also, by speaking of the lot on which the building stands, and making the interest of the owner therein, to an amount not exceeding one acre in a city, or forty acres in the country, liable to the lien, seems to indicate clearly that it did not contemplate bridges as included within its provisions.

The case cited by the counsel for the defendant in error, from 7 Blackf. 387 [*Olmsted v. McNall*], we think was properly decided. The structure in that case was clearly a building within the meaning which we attribute to our statute. It was

a floating but stationary warehouse, stationed along the bank of the river, of which the owner held a lease. The pleader who drew the bill evidently had in mind the same idea of a building for which we are contending, for he took pains expressly to state that it was "a building with perpendicular walls and a shingled roof," allegations which could only have been designed to bring it within the ordinary meaning of the word "building." The court held that the fact that it was a floating building did not prevent it from being a building, and that the owner had such an interest in the place where it stood as could be sold on execution. This, we think, was very proper, but it comes far from sustaining the position that the bridge is a building.

We think, therefore, that the court erred in holding that the railroad bridge was subject to a mechanic's lien. And for this reason, the judgment must be reversed, with costs.

There being two cases between the same parties involving the same question, this opinion will dispose of both.

The judgments in both are reversed, with costs.

DIXON, C. J., having been of counsel for Vanderpool. took no part in this decision.

WHAT STRUCTURES ARE SUBJECTS OF MECHANICS' LIENS.—Estates and interests affected by mechanics' liens: Note to *Lyon v. McGuffey*, 45 Am. Dec. 678-680; note to *Loonis v. Hogan*, 61 Id. 697 et seq.

BUILDINGS.—Mechanics' liens are always given upon "buildings." This word has on several occasions received a judicial construction. In the principal case, the word is carefully and correctly defined. In *Truesdell v. Gay*, 13 Gray, 311, Bigelow, J., said: "The word 'building' cannot be held to include every species of erection on land, such as fences, gates, or other like structures. Taken in its broadest sense, it can mean only an erection intended for use and occupation as a habitation or for some purpose of trade, manufacture, ornament, or use, constituting a fabric or edifice, such as a house, store, church, or shed." In *Coddington v. Dry Dock Co.*, 31 N. J. L. 477, it was said that the legislature evidently did not use the term "building" in its broadest signification. The word as used in the statute did not include ships, though ships are built; but the word designated something in the nature of houses, mills, or manufactories—buildings attached to and becoming a part of the land itself. A bridge is not a building: The principal case; *Commissioners v. Norrington*, 82 Ind. 190; *Burt v. Washington*, 3 Cal. 246; *Dunn v. North Mo. R. R.*, 24 Mo. 493. Neither swings nor seats can be included within the words "buildings" or "structures": *Lothian v. Wood*, 55 Cal. 159. A wall built around three sides of the stack of an iron furnace at a distance of a few feet from it, in order to protect it from the possible sliding down of the earth from a hill at the foot of which it stands, is not a building: *Truesdell v. Gay*, 13 Gray, 311. And to the effect that a fence is not a building, see the principal case; *Bailey v. Hull*, post, p. 706; *Hill v. La Crosse etc. R. R. Co.*, 11 Wis. 224.

BOATS, DOCKS, WHARVES, AND DITCHES.—Mechanic's lien laws are not intended to create liens upon mere personal chattels, but upon lands or things in some manner attached to the realty; not to embarrass commerce or hinder the ready exchange of purely personal property, but to secure the erection of valuable structures and protect the interests of him who may furnish the materials and build the same: *Galbreath v. Davidson*, 25 Ark. 490, 494. The object of the statute is to create a lien on land or on what in contemplation of law is land, and not merely movable property: *Coddington v. Dry Dock Co.*, 31 N. J. L. 477. And so also no lien is usually created upon a building or upon land for machinery or other articles unless they become a part of the realty. And no lien can be acquired upon specific articles furnished for a building as distinct from the building, but only upon the building in which they are placed, or on the land whereon they are placed, or both: *Baylies v. Simen*, 21 Ind. 45. See also *Goodin v. Ellicardsville Hall Association*, 5 Mo. App. 289; *Baum v. Covert*, 62 Miss. 766; *Parriak's Appeal*, 83 Pa. St. 111.

A wharf-boat is attached to the soil and savors of the realty, and is subject to a mechanic's lien under a statute providing for such liens on "any building, edifice, or tenement:" *Galbreath v. Davidson*, 25 Ark. 490. The term "buildings" embraces floating wharves for receiving, storing, and forwarding merchandise: *Olmstead v. McNall*, 7 Blackf. 387. But a floating dock is not a building or a fixture, but mere movable property: *Coddington v. Dry Dock Co.*, 31 N. J. L. 477. Under a statute providing for liens on buildings and wharves, no lien can be had on bridges: *Burt v. Washington*, 3 Cal. 246. The term "other structures connected therewith" includes all structures connected with a wharf, pier, etc., and necessary for its proper use, and sheds erected upon the piers of a navigation company and used for offices and other purposes of the company, are within the statute: *Collins v. Drew*, 67 N. Y. 149. A lien upon canals and ditches is not given by a statute providing for liens upon a "building, wharf, or other superstructure." And flumes constructed at different parts of the line of a ditch cannot change the general character of the work as an excavation. Such flumes are mere connecting links of the ditch over ravines and gulches, and the whole work must be regarded as a ditch: *Willson v. Jackson Water Co.*, 12 Cal. 542.

CONSTRUCTION OF VARIOUS STATUTES AND STATUTORY TERMS.—The statute giving a lien on boats and other vessels for construction, repairs, etc., applies exclusively to vessels intended for navigation: *Olmstead v. McNall*, 7 Blackf. 387. Coal-cars were not included in the word "machine," which, as used in the statute, applied only to fixed or stationary machinery, and did not extend to movable machinery, in *New England etc. Co. v. Baltimore etc. R. R. Co.*, 11 Md. 81. Engines and boilers are not included in the term "improvements" for which on leased premises a lien is given: *Collins v. Mott*, 45 Mo. 100. Reduction-works are included in the words "mill, manufactory, or hoisting-works:" *Gould v. Wise*, 18 Nev. 253. A water-works company was held not to be a manufacturing company so as to be within the statute giving a lien for machinery furnished manufacturing companies: *Kentucky Lead etc. Co. v. New Albany Water Works*, 62 Ind. 63. A house built for the use of a mine, and being a part of the mining property, may be sold with the mine for the purpose of enforcing a lien under the statute: *Keystone Mining Co. v. Gallagher*, 5 Col. 23. The plan of a house, the model of a ship, or the mold by which a ship's timbers are formed, do not enter into the structure, and cannot be regarded as within the statutes by which liens are given, in certain cases, to the material-man and the laborer: *Ames v. Dyer*, 41 Me. 397.

SIDEWALKS.—The “erection, construction, or finishing” of buildings does not apply to the flagging of sidewalks, yards, and areas of buildings in process of erection: *McDermott v. Palmer*, 2 E. D. Smith, 675. A statute giving a lien for the “building, altering, repairing, or ornamenting any house or other building, or appurtenance thereto,” gives no lien upon a lot for curbing, grading, and paving the street in front of the same, though done under contract with the owner of the lot: *Smith v. Kennedy*, 89 Ill. 485. Making a pavement in front of a lot or abutting thereon cannot be regarded in any sense as the “construction or repair” of a building on such lot: *Knaube v. Kirchner*, 39 Ind. 217. Where, however, the contract with a bricklayer is to do all the brick and stone work about the erection of a building, including the laying of the pavement, the contract being entire, a mechanic’s lien may be filed including the work upon the pavement. It would be otherwise, however, if the pavement were provided for in a separate contract: *Yearsley v. Flanigen*, 22 Pa. St. 489. The New York statute of 1862 gives a lien for flagging a sidewalk in front of a building: *Moran v. Chase*, 52 N. Y. 346.

CHURCHES as well as other buildings are subject to mechanic’s liens. At common law, the estates of the church were exempt from execution. But in this country, a church is looked upon as equally liable with other buildings to satisfy the claims of builders and material-men: *Jones v. Mount Zion Congregation*, 30 La. Ann., pt. 1, 711; *Beam v. First Meth. Ep. Church*, 3 Clark, 343. A church is a “building”: *Presbyterian Church v. Allison*, 10 Pa. St. 413. The inclusion of the grave-yard with the church as subject to the lien was held to be erroneous: *Beam v. First Meth. Ep. Church*, 3 Clark, 343. It is not, however, against public policy nor the spirit of our laws to donate in perpetuity a lot of ground for charitable purposes, such as for the use of a religious denomination as a place of worship; and in such a case, a mechanic’s lien cannot be created on the lot for the erection of a church thereon: *Orison v. Hill*, 17 Ark. 483. A mechanic’s lien does not attach to a church erected under a contract with a society of the Methodist Episcopal church upon land the legal title to which is vested in the survivor of a board of unincorporated trustees, in trust for the use and benefit of the society, unless the church was erected with the consent of such survivor: *Peabody v. Eastern Methodist Society*, 5 Allen, 540.

PUBLIC BUILDINGS ARE NOT SUBJECT TO MECHANICS’ LIENS: Note to *Lyon v. McGuffey*, 45 Am. Dec. 680. Public buildings, being exempt from seizure and sale under execution on the ground of public policy and necessity, are not the subjects of mechanics’ liens: See cases cited in the note to *Lyon v. McGuffey*, *supra*; *People v. Butler*, 2 Neb. 5; *Panola County Supervisors v. Gilen*, 59 Miss. 198; *Wilson v. Commissioners*, 7 Watts & S. 197; *Poillon v. Mayor of N. Y.*, 47 N. Y. 666; *Brinckerhoff v. Board of Education*, 37 How. Pr. 499, 520. A building owned by a county, and used for county purposes, is not liable to a mechanic’s lien: *Lewis v. Chickasaw County*, 50 Iowa, 234. But the property of a municipal corporation not devoted to public use may be taken and sold to satisfy a judgment against the corporation: *Brinckerhoff v. Board of Education*, 37 How. Pr. 499. Court-houses are not the subject of mechanics’ liens: Note to *Lyon v. McGuffey*, 45 Am. Dec. 680; *Parke County Comm’rs v. O’Conner*, 86 Ind. 531; S. C., 44 Am. Rep. 338; *Whitney v. Story*, 54 Iowa, 81; S. C., 37 Am. Rep. 189. County bridges are not liable to mechanics’ liens: *Pike County Comm’rs v. Norrington*, 82 Ind. 190; *Loring v. Small*, 50 Iowa, 271; *Charnock v. Colfax*, 51 Id. 70; *McPheeters v. Merrimac Bridge Co.*, 28 Mo. 465. A fire-bell tower of a municipal corporation is not subject to a mechanic’s lien: *Leonard v. Brooklyn*, 71 N. Y. 498. So, also, of a reform school: *Pat-*

erson v. Pennsylvania Reform School, 92 Pa. St. 229. But in Louisiana it has been held that a jail built for a parish, under contract with the police jury of the parish, is subject to a mechanic's lien: *McKnight v. Grant Parish*, 30 La. Ann., pt. 1, 361.

Public School-houses and Public School Property are not subject to mechanics' liens: *Brinckerhoff v. Board of Education*, 37 How. Pr. 499; *Thomas v. Urbana School District*, 71 Ill. 283; *Board of Education v. Neidenberger*, 78 Id. 58; *Loring v. Small*, 50 Iowa, 271; *Charlock v. Colfax*, 51 Id. 70; *Abercrombie v. Ely*, 60 Mo. 23; *Hastings v. Woods*, 2 Mo. App. 148; *Williams v. Controllers*, 18 Pa. St. 275. In *Shattell v. Woodward*, 17 Ind. 225, however, it was held that a school-house, built by order and contract of a township trustee, may be subjected to a mechanic's lien. It has also been held that though school buildings are exempt from execution, they may still be subject to a mechanic's lien under a statute giving a lien on any building; and though the lien may be incapable of enforcement, yet the provisions of the lien law may determine the relative rights and liabilities of the subcontractor, the contractor, and the school district: *Wilson v. School Dist. No. 2*, 17 Kan. 104.

A university building belonging to the state is not subject to mechanics' liens: *Thomas v. Industrial University*, 71 Ill. 310. But in *Board of Education v. Greenbawm*, 39 Id. 610, it is held that the normal university is not the property of the state, but is the property of the "board of education of the state of Illinois," as a corporation whose charter cannot be repealed by the legislature. Unlike a municipal corporation, the only remedy a creditor has against it is by a judgment and execution as in a case against an individual or other corporation not of a municipal character. Accordingly, the normal university building is subject to a mechanic's lien. A provision in a statute establishing a university prohibiting the trustees "for any cause, or under any pretext whatever, from incumbering by mortgage or otherwise, the real estate or any property of said institution, or involving it in any debt which they have not the means of paying," will not exempt the building erected by the university corporation from liability to a mechanic's lien: *University of Louisville v. Reber*, 43 Pa. St. 305.

EXEMPTION OF PROPERTY OF CORPORATIONS OF PUBLIC NATURE.—Exemption from execution and mechanics' liens has not been confined to the property of purely public corporations, such as counties and municipal corporations, but has been extended to the property of corporations whose purposes and objects are distinctively public. Corporations, other than municipal, which are purely public are divided into public and private corporations; that is, into those that are agencies of the public directly affecting it, and those which only affect it indirectly by adding to its prosperity in developing its natural resources or improving its mental or moral qualities. Of the former are corporations for the building of bridges, turnpike roads, railroads, canals, and the like. The public is directly interested in the results to be produced by such corporations in the facilities afforded to travel and the movements of trade and commerce. Hence this use is not to be disturbed by the seizure by creditors of any part of their property essential to their active operations. Creditors must recover their debts by sequestering the earnings of the corporations, in the mean time allowing them to progress with their undertaking for the accommodation of the public. A corporation for the introduction of water into a town for the accommodation of the inhabitants is a public corporation, and its buildings and other property necessary for carrying on its operations are not subject to a mechanic's lien: *Foster v. Fowler*, 60 Pa. St. 27; see *Kentucky Lead etc. Co. v. New Albany Water Works*,

62 Ind. 63. A bridge authorized to be built by a statute incorporating a bridge company is a public bridge, and not subject to a mechanic's lien: *McPheters v. Merrimac Bridge Co.*, 28 Mo. 465. A corporation whose business is the transaction of a general storage and elevator business, which advances money and issues warehouse receipts, is not a public corporation in which the interest of the general public is such that the real estate of the corporation should be exempt from the operation of the mechanics' lien laws: *Glward Point Storage Co. v. Southwark Foundry Co.*, 105 Pa. St. 248.

Railroad corporations have been recognised as being sufficiently public in their nature to make it contrary to public policy to permit an individual to impede the execution of their public functions by filing and enforcing a mechanic's lien upon property essential to the operation of the road. Therefore it has been held that a railroad, including its road-bed and franchise, is not the subject of mechanics' liens: *Tyler Tap R. R. Co. v. Driscoll*, 52 Tex. 13; *Central etc. R. R. Co. v. Henning*, Id. 466; see also *Col. Plq. & Ind. R. R. v. Coe*, 10 Ohio St. 372. In *Dunn v. North Missouri R. R.*, 24 Mo. 493, it was held that buildings constructed for a public railroad authorized by an act of the state legislature are not the subjects of mechanics' liens. A stable built and occupied by a horse-railroad company is, however, subject to a mechanic's lien, for it is not absolutely necessary to the exercise of the corporate franchise that the company should own the stable: *McLean v. Hestonville etc. R. R. Co.*, 5 Phila. 13. So a depot-building of a railroad company is subject to a mechanic's lien: *Hill v. La Crosse etc. R. R. Co.*, 11 Wis. 214; and in this case it was held that a building built for a railroad company is as clearly within the letter and spirit of the statute concerning the lien of mechanics as any other building. And so it is held that a statute giving a lien upon "any bridge" includes a railroad bridge or a turnpike bridge. Had the legislature intended to exclude such bridges from the operation of the statute, the act would not have been couched in such general words: *Smith Bridge Co. v. Bowman*, 41 Ohio St. 37; S. C., 52 Am. Rep. 67. In *Vanderpool v. La Crosse etc. R. R. Co.*, 44 Wis. 652, it was held that a statute providing for liens upon any bridges erected in the state did not operate retrospectively so as to give a lien upon a railroad bridge constructed before its passage. The matter of liens upon railroads is, however, commonly provided for by statute. In the majority of states, statutes have been enacted which provide specifically for liens upon railroads for labor performed and materials supplied in their construction and operation: *Jones on Railroad Securities*, secs. 582 et seq.

HOUSES OF FOREIGN MINISTERS.—It seems that an exception to the rule of *lex rei sitæ* exists in the case of houses erected by foreign ministers for residence: See *Phillips on Mechanics' Liens*, sec. 183; *Byrne v. Herran*, 1 Daly, 344; *Novello v. Toogood*, 1 Barn. & Cress. 554. But in *Byrne v. Herran*, *supra*, it was held that a minister plenipotentiary of a foreign power is not exempt from the application of the mechanic's lien law of this state, as to any house or building which is not used as a mansion for purposes connected with his representative character; and where the exemption is claimed, it must appear by the proof that he is entitled to a suspension of the rule of *lex rei sitæ*. In *Novello v. Toogood*, *supra*, it was held that where the servant of an ambassador did not reside in his master's house, but rented and lived in another house, part of which he let in lodgings, his goods in that house, not being necessary for the convenience of the ambassador, were liable to be distrained for poor-rates.

HOMESTEADS.—All liens acquired before the homestead has been established

must be raised, or the homestead will be subject to forced sale for the satisfaction of such liens: *Farmer v. Simpson*, 6 Tex. 303. Where the lien has properly attached, it will not be defeated by the homestead exemption: *Pope v. Graham*, 44 Id. 196; *Potulinsky v. Krompton*, 26 Id. 307. But where a mechanic furnished material and built a house for a person who moved into it and occupied it as a homestead, the mechanic retained no lien upon the property; though it would have been different if the parties had contracted under the terms of the statute for a lien before the house had been built and become a homestead: *Merchant v. Perez*, 11 Id. 20. And in Texas, in order to fix a mechanic's lien upon a homestead, the contract must be in writing: *Huff v. Clark*, 59 Id. 347. In Tennessee, it is held that the homestead right cannot prevail over the mechanic's lien for labor and materials furnished in the construction of a building upon the homestead property: *Thompson v. Wickersham*, 9 Bart. 216. But in Minnesota, a mechanic's lien cannot be acquired on a homestead by furnishing lumber for the erection of a house thereon: *Keller v. Struck*, 31 Minn. 446; *Cogel v. Mihov*, 11 Id. 475.

HOUSE BUILT ON LAND OF ANOTHER: See note to *Lyon v. McGuffey*, 45 Am. Dec. 679; note to *Loonke v. Hogan*, 61 Id. 697.

THE PRINCIPAL CASE IS CITED to the point that bridges, fences, and other structures of a similar character are not included within the meaning of the word "building" in the mechanic's lien law: *Bailey v. Hull*, *post*, p. 706; *Hill v. La Cross etc. R. R. Co.*, 11 Wis. 224.

MILWAUKEE AND CHICAGO R. R. Co. v. HUNTER.

[11 WISCONSIN, 180.]

GENERAL EXCEPTION TO INSTRUCTION IS NOT SUFFICIENT TO REVERSE JUDGMENT FOR ERRONEOUS CHARGE, unless it be entirely erroneous.

PLAINTIFF CANNOT SUSTAIN ACTION FOR NEGLIGENCE, AND MUST BE NON-SUITED where, from his own showing, he appears to have been guilty of negligence which contributed as a proximate cause to the injury.

NONSUIT WILL NOT BE GRANTED ON GROUND OF FAILURE OF PLAINTIFF TO SHOW LACK of contributory negligence, where his evidence makes out a clear case of injury from the negligence of the defendant, and no circumstance appears therefrom tending to prove that the plaintiff failed to exercise ordinary care.

RULE THAT BURDEN IS UPON PLAINTIFF TO DISPROVE NEGLIGENCE on his part doubted.

NEGLECT OF RAILROAD COMPANY IS SHOWN FROM EVIDENCE that plaintiff was injured by train of the defendant, which approached without signals and ran into a loaded team of the plaintiff, which he was endeavoring to drive over the railroad crossing, which had been recently raised and rendered difficult to cross.

NEW TRIAL WILL NOT BE GRANTED ON GROUND THAT VERDICT IS CONTRARY TO EVIDENCE in action against railroad company, because of admissions of contributory negligence made by plaintiff shortly after the accident while he was in an injured condition, and in answer to questions by agents of the company.

CONTRIBUTORY NEGLIGENCE IN ACTION AGAINST RAILROAD COMPANY for injuries caused by a train running into a team at a crossing, is not

shown by evidence that the plaintiff's horse balked at the crossing, where the horse was a young horse whose habits were not confirmed, and where his balking might well be attributed to his inability to raise the loaded wagon over the track, which was being raised at the crossing, and had been left in an unfinished condition. Such evidence is, therefore, not ground for a new trial as newly discovered evidence.

EVIDENCE OF CONDITION OF TRACK AT CROSSING IMMEDIATELY AFTER INJURY is admissible in an action against a railroad company for a collision with a team at a crossing. Though the question for the jury is its condition at the time, its condition immediately before and immediately after are proper circumstances to be considered.

ACTION to recover from the railroad company damages alleged to have been suffered by the plaintiff through the negligence of the defendant in running into plaintiff's team at a railroad-crossing. Defendant's motion for a nonsuit was overruled. Verdict of seven thousand dollars was rendered for the plaintiff. The defendant excepted to the charge of the court, and on the coming in of the verdict moved for a new trial. Motion overruled. Writ of error sued out by the defendant.

Jason Downer, for the plaintiff in error.

Cary and Pratt, for the defendant in error.

By Court, PAINE, J. The record here shows no exception to the charge of the court below, and we shall therefore examine no questions made as to its correctness. Some question was made as to whether the record here was not mistaken upon that point, but it is conceded that if so, there was only a general exception. But we do not think that would vary it, as it is well settled that a general exception is not sufficient to reverse a judgment for an erroneous charge, unless it is entirely erroneous, which certainly was not the case here.

The principal question is as to the correctness of the ruling refusing to grant a nonsuit. Upon that question, the argument for the plaintiff in error concedes that the proof was such as would have warranted the jury in finding negligence on the part of those running the train, which caused the injury. But it is contended that the law requires the plaintiff in such an action, in order to make out a *prima facie* case, to show that he himself was not guilty of negligence which contributed to the injury; and that so far from showing that in this case, the evidence of the plaintiff showed that he was guilty of negligence. If such is the law, and if such is the plaintiff's own showing, the motion for a nonsuit should have been granted.

The law is well settled that if the plaintiff in such an action was guilty of negligence which contributed as a proximate cause to the injury, he cannot recover. But the point is, How is that to be got at? If such negligence existed, is it to be shown as a defense? or is the plaintiff bound to show in the first instance that he was not guilty of negligence? This point also has been decided, and the burden of proof has been held to be upon the plaintiff. There is certainly a number of authorities that so state the law, and it was so held by this court in *Dressler v. Davis*, 7 Wis. 527.

I do not propose to enter into a review of these cases. But my own opinion is, the doctrine as stated by them is not sound upon principle. It seems to me directly in conflict with another well-settled and salutary rule, that negligence is not to be presumed. And I think the doctrine has grown out of an improper effect given to the case of *Butterfield v. Forrester*, 11 East, 61, which is the leading case upon the subject. In that case, the defendant had placed an obstruction in the road, and the plaintiff rode against it and was injured. But his own witness, who proved the injury, said that he was riding with great violence, and that if he had not been, he might have observed and avoided the obstruction. The jury were instructed that if the plaintiff, by exercising ordinary care, might have avoided the obstruction, and he did not exercise it, he could not recover, and this was held to be correct. The court said: "Two things must concur to support this action—an obstruction in the road by the fault of the defendant, and no want of ordinary care on the part of the plaintiff."

Now, I think this case by no means justifies the doctrine in question. The plaintiff's own evidence showed that he was guilty of negligence, and there was no question as to the burden of proof in the case. The remarks of the court were applicable to that case, and amount to no more than this, that a want of ordinary care on the part of the plaintiff will defeat a recovery, and he, having shown such want, could not recover.

This was no violation of the rule that negligence is not to be presumed; but was only saying that where the plaintiff's own evidence showed his negligence, he could not recover, unless by further evidence he disproved that inference and showed ordinary care. But this does not at all support the conclusion that, where the plaintiff can show an injury to have been caused to him by the negligence of the defendant and his evidence raises no inference of negligence against him.

that he is bound, in order to establish a *prima facie* case, to go further, and show that he was not guilty of negligence. Such a rule can only rest upon a presumption of negligence; for if the plaintiff's evidence has no tendency to prove any negligence, if he is required to disprove it, it can only be upon the ground that it is presumed.

The plaintiff's negligence seems to me to be as properly matter of defense as *son assault desmesne* in an action for an assault and battery. Suppose the case of *Butterfield v. Forrester*, 11 East, 61, had been such an action, and the plaintiff's witness had testified that he first assaulted and struck the defendant, and thereupon the defendant returned the blows which constituted the assault and battery complained of; suppose the court had said the plaintiff could not recover, that two things were necessary to sustain his action, an assault and battery by the defendant, and a want of any justifiable cause on the part of the plaintiff—could such a decision ever have authorized the rule that in all such actions, even where the plaintiff could show an assault and battery by the defendant, by evidence having no tendency to show any cause on his part, that he was bound to go further, and disprove the commission of any act that would have justified it? I think not; and yet such a conclusion would be just as well supported as the rule which has been based upon *Butterfield v. Forrester*, *supra*. I do not think it rests upon principle, and it must sooner or later be abandoned.

This is clearly indicated by a recent decision of the court of appeals in New York in the case of *Button v. Hudson River R. R. Co.*, 18 N. Y. 248. The action was by a widow for the negligent killing of her husband by the cars of the defendant. The question was whether the deceased was guilty of negligence.

Strong, J., after referring to the authorities, and stating the rule that the burden of proof was on the plaintiff to show no want of ordinary care on the part of the deceased, then uses the following language: "It must not be understood that it was incumbent on the plaintiff in the first instance to give evidence for the direct and special object of establishing the observance of due care by the intestate; it would be enough if the proof introduced of the negligence of the defendants, and the circumstances of the injury, *prima facie* established that the injury was occasioned by the negligence of the defendants, as such evidence would exclude the idea of a want

of due care by the intestate, aiding to the result. Ordinarily, in similar actions, when there has been no fault on the part of the plaintiff, it will sufficiently appear in showing the fault of the defendant, and that it was a cause of the injury; and when it does so, no further evidence on the subject is necessary." Now, this seems to me to be saying that the burden of proof is on the plaintiff, but that he need not introduce any proof to establish the fact; that if his evidence does not prove that he was negligent, that will be sufficient proof that he was not. At the end of the case, it is stated that "Selden, J., objected to an implication which he conceived to lurk in the opinion of Strong, J., but which Strong, J., disclaimed, that in the absence of proof of any circumstances importing negligence on the part of the plaintiff, there might be a presumption thereof which he is required to repel, whereas his negligence is to be inferred from evidence, and is not to be presumed." This case makes so wide an inroad upon the doctrine that the burden of disproving negligence is on the plaintiff, that it might as well have said that such was not the law.

But conceding the rule to be as stated, if we examine the evidence offered by the plaintiff at the time when the motion for a nonsuit was made, upon the principle of the case just referred to, we are satisfied that the motion was properly overruled. The evidence showed that the plaintiff was driving from the east to the west with a heavy load; that he was driving slowly, as he must from necessity; that there was a curve in the railroad not far south of the crossing, so that to see south upon the track to any considerable distance, the party must be a little east of the crossing; that the cars approached without any of the usual signals, and ran upon the plaintiff's wagon at the crossing. It further showed that the plaintiff had frequently passed upon the road before, but also, that on that very afternoon the railroad track had been raised, and only loose dirt thrown in outside of the rails, so that the wheels of a loaded team would sink in, and on striking the rails would have to accomplish a perpendicular rise of from six to ten inches. We are fully satisfied, as well from the evidence given before the motion for a nonsuit as from all that was afterwards offered, that the negligence of the company on leaving the highway in this almost impassable condition, was the real cause of the disaster. There was, therefore, a clear case of injury, from the negligence of the defendant, established, and we see no circumstance in the proof, at the time of

the motion, tending to prove that the plaintiff failed to exercise ordinary care. The night was dark, and any one who has ever driven in a dark night, even on a road with which he is familiar, will know that he cannot always tell his exact locality. And it certainly cannot be required as a legal rule, however wise it may be to exercise extraordinary precautions, that a man thus traveling, even though he knows that he has to cross a railroad, should get out and feel his way along on foot; and that in default of some such course, the cars may run over him at the crossing with entire impunity, without giving any notice of their approach.

We are satisfied, also, that the jury would have been warranted in inferring from the evidence that the plaintiff did not drive upon the crossing when the cars were in the immediate vicinity, as was urged by the counsel for the company. Markley testified that he heard both wagons before he heard the train. One was already west of the crossing, and the other, which was the plaintiff's, was approaching it. There was testimony that the noise of the train could be heard at a great distance; that circumstance was strongly relied on by counsel to show the negligence and inattention of the plaintiff. But we infer from it that at the time the plaintiff drove against the track, the cars were at some distance off, that he was delayed by the difficulty of crossing, and that during the excitement and exertion consequent upon finding himself in such a situation, his attention was so fixed upon his endeavor to extricate himself that he did not observe the approaching train, which neglected to give any signals. The noise of the wheels and the horses' hoofs rattling upon the rails and plank might, while in that situation, have prevented him from noticing the ordinary sound of approaching cars. But it seems absolutely impossible that both he and his father should have failed to hear the cars, unless they were both deaf, if they were so near immediately before they struck the railroad that the wagon, if not delayed, could not have crossed without being hit. We are satisfied that the wagon was delayed at the crossing, and that it is highly probable that if the proper signals had been given, the plaintiff and his father might have been able to leave the wagon in time for the latter to have saved his life, and the former to have escaped the serious injury that was inflicted upon him. We think, therefore, it was a clear case of negligence in the defendants, and that upon the rule laid down by the New York court of appeals, the jury would have

been warranted in inferring that there was no want of ordinary care on the part of the plaintiff.

Nor do we think the evidence afterwards offered was of such a character as to require us to reverse the judgment for the refusal of the court below to grant a new trial because the verdict was against evidence. There were some admissions by the plaintiff, to the effect that he did not think of the railroad till he struck the track, etc., but these were made immediately after the injury, when his body was in a mangled condition, and his statements were in reply to the inquisitive agents of the company, and must of necessity have been broken, disjointed, and without any attempt on his part to give a connected statement of the facts. All the objections to the character of admissions as evidence apply with double force to those here offered.

The whole matter was left to the jury under a charge, to which, in its general scope, the company certainly could make no objection. They have passed upon it, and we are satisfied with their verdict.

And we do not think the newly discovered evidence was of such a character as would justify the granting of a new trial. It consisted simply in a statement made by the plaintiff, under the same circumstances in which the others were made, that "if his colt had not balked, it would have been all well enough." If his horse had balked, we do not think this should prevent his recovery, if the approaching train negligently failed to give any signal so that he might have saved himself. And although the driving of a horse known to be of that disposition might, under some circumstances, amount to culpable negligence, yet we think there was nothing in the admission of the plaintiff, as sworn to, that would show such to have been the case here. On the contrary, it shows that it was a young horse, whose habits were not confirmed, and the jury would have been well warranted in finding that it balked from inability to raise a heavy load over the track in the condition in which the company had left it.

The other parts of the affidavit are as to admissions of the same character as those referred to, and liable to the same objections.

Nor do we think the court erred in admitting evidence of the condition of the track immediately after the injury. It is true, the question for the jury was, What was its condition at the time? But where that is the question with reference to any

particular thing, its condition immediately before and immediately after are proper circumstances to be considered.

Upon the whole, we think the judgment must be affirmed, with costs.

RAILROAD COMPANY IS LIABLE FOR INJURIES ENSUING FROM OBSTRUCTION OF PUBLIC CROSSING: *Murray v. South Carolina R. R. Co.*, 70 Am. Dec. 219; *Rauch v. Lloyd*, 72 Id. 747.

FAILURE TO GIVE WARNING OF APPROACHING TRAIN AT CROSSING IS NEGLIGENCE: *Murray v. South Carolina R. R. Co.*, 70 Am. Dec. 219; *Reeves v. Delaware etc. R. R. Co.*, 72 Id. 713; *Chicago & R. I. R. R. Co. v. Still*, 71 Id. 236, note 239.

BURDEN OF PROOF OF CONTRIBUTORY NEGLIGENCE: Note to *Fariak & Co. v. Reigle*, 62 Am. Dec. 686-688; *Lucas v. New Bedford etc. R. R. Co.*, 66 Id. 406, and note 410; *Lane v. Bryant*, 69 Id. 282; *Chicago v. Major*, 68 Id. 553, and note 559. In Wisconsin, the rule is now established that the burden is upon the defendant. The plaintiff in an action for injury sustained by negligence of another is not bound in the first instance to show that he himself was not guilty of negligence which contributed to the injury, but it is enough if the proof introduced, and the circumstances attending the injury, establish *prima facie* that the injury was occasioned by the negligence of the defendant: *Achtenhagen v. Watertown*, 18 Wis. 332, citing the principal case. In an action for injuries from negligence, where there is nothing in plaintiff's evidence tending to show contributory negligence, the presumption is against it, and the burden of proof upon the defendant. If contributory negligence conclusively appears from the plaintiff's own evidence, he will be nonsuited; while if the evidence merely tends to show such negligence, the question will be for the jury: *Hoyt v. City of Hudson*, 41 Id. 108; *Hoth v. Peters*, 55 Id. 410, citing the principal case. Contributory negligence is a pure matter of defense: *Rundall v. Northwestern Telegraph Co.*, 54 Id. 147; *Sheff v. City of Huntington*, 16 W. Va. 317, citing the principal case.

DECLARATIONS MADE IMMEDIATELY AFTER ACCIDENT, ADMITTING CONTRIBUTORY NEGLIGENCE, are not conclusive evidence of that fact: *Zemp v. Wilmington etc. R. R. Co.*, 64 Am. Dec. 763.

GENERAL EXCEPTION TO ENTIRE CHARGE RAISES NO QUESTION which the appellate court can review, unless the whole charge is erroneous: *Strachan v. Muxions*, 31 Wis. 206; *Heath v. Heath*, Id. 229. Where a finding embraces numerous distinct facts, a general exception "to each and every finding of fact" therein is insufficient, and amounts to nothing: *Pageot v. Sexton*, 21 Id. 196, citing the principal case.

BAILEY v. HULL.

[11 WISCONSIN, 289.]

PARTY IS ENTITLED TO MECHANIC'S LIEN FOR BUILDING FENCE, under a statute providing that "any person performing manual labor upon any land, timber, or lumber" shall be entitled to a lien thereon. This act was designed to include at least all labor done directly upon the land for the purpose of preparing it for use as such.

MECHANIC'S LIEN IS NOT WAIVED BY TAKING NOTE which does not extend the credit beyond the time in which the party is required to sue to maintain his lien.

ONE HAVING MECHANIC'S LIEN ON LAND MAY FIX RATE OF INTEREST to be recovered on the debt by taking a note for the debt fixing the rate of interest.

JUDGMENT RENDERED IN ENFORCEMENT OF MECHANIC'S LIEN MAY, under Wisconsin statute, order the sale of the property to be made under execution as ordinarily.

ACTION to enforce mechanic's lien. No answer served, and judgment taken in favor of the plaintiffs for the amount found due, with interest at ten per cent; for a lien upon the premises to that amount; and ordering a sale of the premises. Afterwards, the defendant filed an affidavit averring that the premises were advertised for sale by the sheriff, without the issuance of any execution other than a certified copy of the judgment, and moved a perpetual stay of the sale unless execution be issued; and also that the judgment be vacated or modified by striking out all that part authorizing the sale of specific real property. The latter part of the motion concerning striking out a part of the judgment was denied; but it was ordered that no sale under the judgment should be made without the issuance of an execution. The plaintiffs appealed from the last clause of the order, and the defendants from the rest, and from the judgment.

Waldo and Ody, for the plaintiffs.

Smith and Salomon, for the defendant.

By Court, **PAINE, J.** The principal question presented by this appeal is, whether a party is entitled to a lien for building a fence. We think it clear that he would not be if, in order to sustain the lien, it was necessary to hold that a fence was "a building," within the meaning of that word, as used in chapter 153 of the revised statutes of 1858, concerning the lien of mechanics and others. We had occasion to place a construction upon that word, in the case of *La Crosse and Milwaukee R. R. Co. v. Vanderpool*, 11 Wis. 119 [*ante*, p. 691], decided at this term, where we held that it did not include bridges, fences, and other erections of a similar character.

But section 12 provides that "any person performing manual labor upon any land, timber, or lumber" shall be entitled to a lien thereon, to be enforced according to the provisions of that chapter. The words "work done on land" are somewhat indefinite in their character, and it might be a matter of some

difficulty to determine accurately all the kinds of labor for which they would give a lien. But without attempting to decide whether they have any further extent, we think they were certainly designed to include all labor done directly upon the land, for the purpose of preparing it for use as such. And fencing would seem to fall within this class. It is done upon the land, the fence becomes appurtenant to the land, and its object is to enable the land to be used or occupied as such. We think, therefore, that under this section the plaintiffs were entitled to a lien.

We think, also, it was not waived by taking a note, the time of the payment not being extended beyond the year in which the party was required to commence his action. There have been authorities, we are aware, which have held the contrary; but we think the weight of authority is decidedly in favor of the position that the taking of a note which does not extend the credit beyond the time in which the party is required to sue, to maintain his lien, is not a waiver of it, and we can see no substantial reason why it should be.

The interest was properly included. The law provides a lien for the debt, and interest is an incident to the debt. It is true that, in the absence of any agreement by the parties, the law would have fixed it at seven per cent. But the same law allows the parties by agreement to fix it at a higher rate, not exceeding twelve. And having fixed it, the interest at such higher rate follows the debt, just as the legal rate would in the absence of an agreement. We think, therefore, that the judge properly denied that part of the defendant's motion, which asked that the judgment might be modified by striking out all that part that described particular real estate.

The only remaining question is as to that part of the order forbidding a sale without the issuing of an execution. It is true that a sale of property against which a specific lien is adjudged under this law is more analogous to a sale on foreclosures than it is to an ordinary sale on an execution issued against the property generally. And it might be more consistent if the statute should provide for a similar proceeding. But it has not done so. On the contrary, it provides expressly in section 9, that "execution may issue and be levied upon the premises subject to such lien, and sale thereof be made in the manner prescribed by law in ordinary cases." This seems to place it on a similar footing with a sale on execution upon a judgment where real estate has been attached. Section 59,

chapter 131, provides that in the latter case the execution "may, among other things, direct a sale of the interest of the defendant in the property at the time the lien accrued," which time should be specified in the judgment. It is true, there is no express provision of the statute for the insertion of such a direction. But it does provide that the sale may be on execution, and the very nature and object of the proceeding would seem to imply an authority to adapt the execution to the end provided for.

Without saying, therefore, what would be the effect of a sale upon a certified copy of the judgment in such a case, without the issuing of any execution, in the absence of any order to the contrary by the court below, we certainly cannot, in the face of this statute, say that the court below erred in directing the sale to be on execution issued.

We must therefore affirm the entire order, without costs.

PROCEEDINGS TO ENFORCE MECHANIC'S LIENS ARE GOVERNED BY RULES APPLICABLE TO SUITS IN EQUITY, and a decree in such proceedings has the effect of an ordinary chancery decree, and may be executed in the same manner: *West v. Fleming*, 68 Am. Dec. 539; see *Whitney v. Higgins*, 70 Id. 748.

WAIVER OF MECHANIC'S LIEN BY TAKING ADDITIONAL SECURITY: See note to *Goble v. Gale*, 41 Am. Dec. 221-224. A mechanic does not lose his lien by taking a note for the amount payable within the time allowed by law for commencing an action to enforce the lien: *Schmidt v. Gileon*, 14 Wis. 517; *Steamboat Charlotte v. Hammond*, 43 Am. Dec. 538, and note 539.

BLUNT v. WALKER.

[11 WISCONSIN, 334.]

RAILROAD COMPANY MAY DISPOSE OF ITS STOCK TO SUBSCRIBER ON CREDIT, and take as security the note and mortgage of the subscriber, where the company is authorized by its charter to receive subscriptions to its capital stock in the manner in which such corporations usually are.

RAILROAD CORPORATION IS NOT PROHIBITED FROM TAKING NOTE AND MORTGAGE AS SECURITY for a debt by a provision of its charter that it shall not hold, purchase, or deal in any lands other than such as are necessary for use in the running of the road. Such provision is intended to prohibit the corporation from purchasing, holding, or dealing in real estate directly, and in a manner unconnected with the lawful and proper management and control of its affairs and business; and it is not designed to prevent its acquiring an interest therein incidentally, whenever, in the proper exercise of its powers, it becomes necessary for it to do so in order to protect its legal rights.

CORPORATION, IN TAKING MORTGAGE TO SECURE DEBT. IS NOT DEALING IN LANDS.

MORTGAGE IS NOT CONVEYANCE OF LAND, BUT INCIDENT OF DEBT SECURED, and is regarded as personalty.

CORPORATION, THOUGH NOT EMPOWERED TO HOLD AND DEAL IN REAL ESTATE, may yet acquire and transmit title to it, as an incident to its powers to make general contracts touching a particular business; and so also of a corporation whose charter, in express words, prohibits dealing in real estate, for a corporation whose charter is merely silent on this point is impliedly prohibited to the same extent.

STOCK SUBSCRIPTION IS CONTRACT BETWEEN CORPORATION ON ONE SIDE AND SUBSCRIBER ON OTHER, and courts will enforce it for or against either.

CORPORATION WITH POWER TO MAKE CONTRACT, AND NOT RESTRICTED IN MANNER of making it, as to such contract stands on the same footing as a natural person, and may adopt any mode calculated to accomplish it which the individual could.

POWER CONFERRED BY CHARTER UPON DIRECTORS TO DECIDE TIME, MANNER, and proportions in which the stockholders shall pay for their respective shares authorizes them to give a subscriber credit.

PROMISSORY NOTE DOES NOT OPERATE AS PAYMENT OR EXTINGUISHMENT of original debt for which it is given, nor does it change its nature, unless it be expressly so agreed. The remedy is merely suspended, and upon the dishonor or non-payment of the note, if it be in the hands of the payee, it may be disregarded, and suit brought for the original indebtedness.

CORPORATION, THOUGH WITHOUT POWER TO MAKE NOTE FOR ITS OWN DEBT, MAY RECEIVE NOTE OF NATURAL PERSON, and it will be good in the hands of an innocent holder, though received for an unauthorized purpose.

ACTION for foreclosure by Blunt, who was a second mortgagee, against the mortgagors Knowlton and wife, the Milwaukee and Mississippi Railroad Company, which was the prior mortgagee, and which afterwards assigned the note and mortgage to Walker, who, by amendment, was afterwards made a party defendant to this action, and against one Hurd, a subsequent incumbrancer. The prior mortgage given by the Knowltons to the railroad company was alleged in the complaint, and in the answer of the Knowltons, to be void, and this was contested by Walker, the company's assignee, the company itself disclaiming any interest in the matter. The prior note and mortgage alleged to be void were given by the Knowltons upon a subscription by Knowlton to thirty shares of the capital stock of the railroad company, and the company issued to him a stock certificate to that amount. The opinion in other respects sufficiently states the case. At the end of the opinion is contained a summary of the pleadings.

D. H. Johnson, for the appellant, Walker.

I. P. Walker, and Hutchinson and Merrill, for the respondent, Blunt.

By Court, DIXON, C. J. The decision of this court, recently announced in the case of *Clark v. Farrington*, 11 Wis. 306, must be considered as decisive of the power of a railroad company, authorized by its charter to receive subscriptions to its capital stock in the manner in which such corporations usually are, to dispose of its stock to a subscriber upon credit, and as a security for the payment therefor at a future day, to receive from the subscriber his note and mortgage. That case arose under the charter of the La Crosse and Milwaukee Railroad Company. In this, the note and mortgage were given to the Milwaukee and Mississippi. We deem it unnecessary to comment upon the general principles there so fully discussed, and shall confine ourselves, as much as possible, to inquiring whether, as is claimed, there is, in this respect, any substantial difference in the powers of the two companies.

The general authority of such corporations, unless there be some provision to the contrary, to receive securities for debts created in the usual course of their business in the same manner as natural persons is not denied. It is admitted that they have this power as an incident to that of entering into the contracts out of which the indebtedness arose. But it is contended that, in this respect, the charter of the Milwaukee and Mississippi company is peculiar; that by its terms the company is prohibited from taking securities upon real estate. It is also said that it differs from others as to the mode in which its stock is to be subscribed and paid for; and that this difference is such as forbade its receiving notes or other securities therefor, but required a present payment, and in money only. We will examine these propositions in the order we have stated them.

The efficient words of the charter, in relation to the power of the company to contract generally, are precisely the same as those of the charter of the La Crosse and Milwaukee company, and authorize the board of directors "to make such covenants, contracts, and agreements, with any person, copartnership, or body politic whatsoever, as the execution and management of the works, and convenience and interest of the company, may require; and in general, to superintend and direct all the operations, receipts, disbursements, and other proceedings of the company." It was held, in the case above referred to, that language like this included the power to make a contract like the present, unless it was elsewhere restricted by the charter, and we determined that it was not. The La

Crosse company is declared to "be capable in law of purchasing, holding, selling, leasing, and conveying estates, either real, personal, or mixed." The Mississippi company is declared to be capable of doing the same thing, "so far as the same may be necessary for the purposes hereafter mentioned, and no further." By a subsequent section, it is authorized to enter upon, take possession of, and use lands along the line of its route, not exceeding a certain width, "provided, that the said corporation shall not, in their corporate capacity, hold, purchase, or deal in any lands within this territory other than the land on which said road shall run, or which may be actually necessary for the construction or maintenance thereof, and of the warehouses, machine-shops, and other fixtures connected therewith."

Herein it is said a distinction is to be made between the powers of the two corporations. It is manifest that it rests upon the language of this proviso, and principally upon the construction to be put upon the words "hold, purchase, or deal in." It is not to be disputed that, as to the direct powers of the corporations in this respect, the distinction is broadly and plainly marked; but the question is, whether it really exists as to their incidental powers, in reference to which the language of the legislature is, in both cases, exactly the same. If the argument be correct, it must go to the extent and be consistent with an intention on the part of the legislature of denying to this company, under all circumstances, those means and facilities for collecting and securing its debts, contracted in the usual course of its corporate business, which are generally, and we might say universally, accorded to corporations of the same or a kindred character. It must be held to destroy the implication arising from the previously granted powers, by which all other corporations are deemed to be authorized to enter into the same or like contracts, and the question is, Did the legislature so intend? It is the sole object of statutory interpretation or construction to discover the intention of the framers; and when that is ascertained, it is to govern. Did the legislature intend to deprive this company of one of the safest and most beneficial methods of securing and enforcing the payment of debts due to it, which is commonly resorted to by other corporations and natural persons for that purpose, and without which, according to the course of trade and business known to prevail in the country, the successful accomplishment of its enterprise would be seriously checked and

embarrassed? Did they mean to say that in no emergency can this company secure to itself, by mortgage or lien upon real estate, a precedent debt, contracted in good faith, and in the legitimate transaction of its business as a corporation? Did they intend to declare that no judgment in its favor should be a lien upon the real estate of the debtor; that no execution upon such judgment should be levied upon such property? Or if it might, that the company could not protect its rights by bidding at the judicial sale? These, and various other similar questions, must be answered in the affirmative before the construction contended for can be sustained.

Before a court establishes a construction which is to operate thus harshly upon the interests of a great number of persons, who have invested their means upon the faith of the chartered rights of a corporation, it should be clearly satisfied that the legislature so intended; it should learn, if possible, what motive there was for such a peculiar and isolated restriction; what good was to be attained by it. If no sufficient motive can be found, and no good discovered, if, on the other hand, its tendency is to thwart and partially defeat the object which the legislature had in view by creating the corporation, it should ascertain if the language is not susceptible of an interpretation, not destructive of, but consistent with, the end sought, and at the same time creditable to the good sense and sound judgment of the legislature. We can discover no motive for such a restriction; no good to be accomplished by it. On the contrary, it seems to us to conflict with the general object of the act, and to be purely evil in its consequences. It is difficult to perceive any reasons why this company was to be so singularly and unjustly restrained. We cannot bring our minds to the conclusion that such was the intention of either the legislature or the promoters.

We are of opinion that there is ample room to give full operation and effect to the language in question, without producing the result contended for. We think it was intended to prohibit the corporation from purchasing, holding, or dealing in real estate directly, and in a manner unconnected with the lawful and proper management and control of its affairs and business; and that it was not the design to prevent its acquiring an interest therein incidentally, whenever, in the proper exercise of its powers, it became necessary for it to do so in order to protect its legal rights.

Such, to us, is the obvious spirit and reason of the prohibi-

tory clause. The legislature meant only to confine the company to the true objects of its charter, and to forbid its diverting its capital and investing it in real property, and engaging in land speculations. Nor will the language used, when interpreted according to the well-settled and most authentic rule of giving to each word its commonly accepted and plain grammatical signification, bear the construction sought to be put upon it. A mortgagee is not, in ordinary conversation, understood to be either the purchaser, holder, or dealer in lands, nor is the act of mortgaging, a purchasing, holding, or dealing in real estate. It is true that it may possibly result in the mortgagee becoming a purchaser. He may be obliged to do so, and to hold and sell, in order to replace his debt, interest, and expenses. But all this is regarded in the law as a mere remedy, a means given to collect the debt. He would not thereby fall within this restraining clause, according to its true spirit and meaning. By a dealer in real property, we understand a person who buys and sells for the purpose of gain and profit. By it, no one would understand to be meant a person whose business it is to loan money upon notes or bonds and mortgages of real estate. In such transactions, the debt is considered the principal thing, the mortgage the incident. It is the money due, to which the mortgagee has the right, and not the land; and unless the mortgagor, by his failure to pay, renders a compulsory proceeding necessary in order to obtain satisfaction, he never acquires an absolute or controlling interest. A mortgage differs widely from an absolute conveyance of land. For all the purposes of negotiation and trade, it is regarded as mere personalty. It attaches itself to the debt and follows its destinies and ownership. It is beneficially assigned, transferred, released, surrendered, reissued, and revived with the instrument evidencing the debt, and with no other forms or ceremonies than are requisite to do so with the latter.

It is urged, because the charter in question contains prohibitory words, that the case stands on different grounds than it would if it were merely silent. We do not so regard it. By all the rules of construing such instruments, mere silence as to a given subject, unless it be necessary to the exercise of some authority conferred, is as absolute a negative of power in relation to it as positive words of restriction. Such words can only be regarded as expressive of a desire on the part of the legislature to remove any doubts which otherwise might pos-

sibly arise. The case stands, then, as if the charter was silent upon the subject, and falls within those numerous authorities which hold that corporations, which are not directly empowered to hold or deal in real estate, may nevertheless acquire and transmit the title to it, as an incident to their powers to make general contracts touching a particular branch of business. And as this company is authorized to receive and hold it for some purpose, its unauthorized acquisitions would seem to come within the doctrine of this court in the cases of *Burns v. Dodge*, 9 Wis. 458; and *Rock River Bank v. Sherwood*, 10 Id. 230 [*ante*, p. 669].

The question of the power of this company to issue its stock, taking therefor the note and mortgage, or other security of the subscriber, payable at a future day, must be regarded as substantially settled by the case of *Clark v. Farrington*, 11 Wis. 306. The charters of the two companies in this respect differ very slightly. By that of the La Crosse, the managing officers are empowered "to decide upon the amount to be paid on such subscription," and "the time and manner and proportions in which the stockholders shall pay subsequent installments on their respective shares." In this, the board of directors are declared to "have full power to decide the time, and manner, and proportion in which the said stockholders shall pay the money due on their respective shares." It is insisted that the words "money due" obviously distinguish this case from the former, that they confine this company to receiving money only for its stock. If this be admitted, we do not see how it follows as a conclusion that a note and mortgage may not be received.

It is well established, both upon natural reason and legal authority, that a stock subscription is a contract between the corporation on one side and the subscriber on the other; and that, as such, courts of justice will enforce it for or against either. It is a contract which this company was fully authorized to enter into. Whatever diversity of opinion may have formerly been entertained upon the subject, it is well settled by modern decisions; and the rational and sound rule no doubt is, that whenever a corporation has the power to make a contract, and is not restricted in the manner of so doing, as to such contract, it stands on the same footing as a natural person; and that in relation thereto, it may adopt any of the modes immediately calculated to accomplish it which the individual could.

In this case, therefore, in the absence of the special words granting to the directors a discretion, the company would have had the power to give to the subscriber a credit. Not departing from the object in view, the terms of the agreement might be varied and modified to suit the taste, convenience, and necessities of the respective parties. But in this case, the discretionary power conferred upon the directors to decide the time, manner, and proportions in which the stockholders shall pay for their respective shares, puts the matter beyond any reasonable doubt. There seems to be no room for argument upon the question. The counsel seems to understand the word "due" to mean owing presently. We cannot do so. Its obvious sense to us is "payable," not presently, but generally; that a party is bound by his contract at some time to pay. To hold it to signify "owing presently" is repugnant to the manifest meaning of the entire sentence, and destructive of the discretion expressly granted. The taking of the note was a mere regulation of the payment. It is one of the most frequent methods of arranging the time, manner, and proportions of payments in pecuniary transactions known to the law and to the entire business world. It is a mistaken idea of counsel that the giving of a promissory note by the debtor operates as an absolute payment or extinguishment of the original debt, or changes its nature. This is not so. Unless the note be expressly given and accepted in satisfaction and discharge of the debt, it only suspends the remedy upon it during its currency, and upon its dishonor or non-payment, if in the hands of the payee, it may be disregarded, and suit brought for the original indebtedness: Chit. Con. 660.

In this case, the mortgagor, at the time of the giving of the note and mortgage, subscribed the stock-book of the company, and it is not perceived why the rule applicable to the giving and receiving of notes generally might not operate here also. Unless we are to give to the language here used some construction different from that which it would receive in ordinary transactions among men, we cannot perceive the smallest room for doubt or hesitation. Suppose an agent or factor, having in his possession the goods of his principal, should be instructed by him to sell them for money only, and should furthermore be told that he had full power to decide the time, manner, and proportion in which the purchasers should pay the money due, would any one doubt that, acting in good faith, he could give such a period of credit as, in his opinion, the interests of

his employer required? And in so doing, could he not receive from the vendee his note, or other written instrument, payable in money? If he should take a note payable in specific articles, it might be beyond his authority, but a cash note certainly would not. Suppose, in addition to this, he should take the precaution to secure the payment of the note by the mortgage of the purchaser, would any court be seriously invited to hold him personally responsible to his principal for a violation of his instructions or duty? We cannot say what might be done, but until we have witnessed it, we must be permitted to entertain doubts upon the subject.

The view we have taken of this case renders the principles laid down in *Russell v. Topping*, 5 McLean, 194, inapplicable to it. That case only goes so far as to hold that a corporation, not expressly authorized, cannot, in a transaction independent of and wholly unconnected with the exercise of its legitimate powers, become the purchaser of real estate, and of course, falls far short of the question here presented. It is not only consistent with but recognizes the correctness of the views we have taken. The case of *Root v. Godard*, 3 McLean, 102, seems equally foreign. The distinction between the giving of a note by a corporation which is forbidden to do so, and the receiving of one from a natural person, by a corporation empowered to do so for some purposes, cannot fail of observation. In the one case, there is an absolute want of power, and the instrument never in fact has an existence. But in the other, it is not so. The individual has the power to make the note, and the corporation to receive it, under certain circumstances, and unless it be declared void by statute, if received for an unauthorized purpose, it will be good in the hands of an innocent holder.

This is an action for foreclosure and sale commenced by the plaintiff as the holder of a second mortgage upon the lands mortgaged to the railroad company against the defendants, Knowlton and wife, as mortgagors, the company as the holder of the prior mortgage, and Hurd as a subsequent incumbrancer. The complaint charged that the mortgage given to the company was illegal and void, asked that it might be so declared and set aside, and that, the lien of the plaintiff might be adjudged to be prior thereto. In all other respects, it is in the ordinary form. Hurd made no answer. The company disclaimed, and the defendant Walker, as the holder of the note and mortgage given to it, asked leave to come in and

defend, which was granted. The complaint was accordingly amended, and he answered, insisting on the validity of his security. He alleged that no part of his principal or interest had been paid, and prayed judgment of foreclosure and sale against his co-defendants, Knowlton and wife, in the usual form, and that out of the proceeds of sale his mortgage might be first paid and satisfied. The defendant Knowlton answered, denying the legality of the note and mortgage, and asking that the defendant Walker might be decreed to cancel and surrender them to him. He also alleged that they were obtained from him by fraud; but although he himself was examined as a witness, no proof tending to establish it was offered.

The plaintiff and the defendant Knowlton prevailed in the court below. Its judgment, therefore, must be reversed, and the cause remanded, with directions that judgment be entered in accordance with the prayer of the answer of the defendant Walker.

PROMISSORY NOTE IS NOT PAYMENT OF DEBT UNLESS SO AGREED: *Tyner v. Stoop*, 71 Am. Dec. 341, and cases cited in the note 347. The taking of a promissory note, either for a precedent liability or for a debt incurred at the time, is no payment, unless expressly so agreed: *Matteson v. Ellsworth*, 33 Wis. 502; *American Button Hole etc. Machine Co. v. Gurnee*, 44 Id. 63; *Hofmayer v. Wells*, 47 Id. 631, citing the principal case. But if a promissory note be received by agreement as a payment and discharge of a debt, it will have such effect: *Jaffray v. Crane*, 50 Id. 353, citing the principal case.

MORTGAGE IS CHOSEN IN ACTION AND MERELY INCIDENT OF DEBT: *McMillan v. Richards*, 70 Am. Dec. 655, and cases cited in the note 675, maintaining this view of mortgages: *Ladd v. Wiggin*, 69 Id. 551. The principal case is cited to this point in *Hitchcock v. Merrick*, 18 Wis. 361.

CORPORATIONS MAY MAKE ALL CONTRACTS THAT ARE NECESSARY AND USEFUL to enable them to carry on the business or accomplish the objects of their incorporation: *Old Colony R. R. Corp. v. Evans*, 66 Am. Dec. 394; *State v. Bank of Smyrna*, 73 Id. 699; *State v. Commissioners*, 57 Id. 409, and cases cited in the note upon what incidental powers are possessed by corporations, 414. Unless prohibited by the terms of its charter, or some public law, it may, in the execution of the purposes for which it was created, resort to any means that would be proper for an individual in executing the same: *Ohio L. I. & T. Co. v. Merchants' L. & T. Co.*, 53 Id. 742. Where the grant of the power is clearly defined, but no mode is prescribed for its exercise, the corporation may adopt such mode as in its judgment will secure the purpose contemplated: *Southern etc. Ins. Co. v. Lanier*, 58 Id. 448. And on the other hand, a corporation may do such acts only as are authorized, either expressly or by necessary implication: *Abby v. Billups*, 72 Id. 143, and cases cited in the note 148. The principal case is cited to the point that in determining the powers of a corporation, the rule is, if the means employed are reasonably adapted to the ends for which the corporation was created, they come within

its implied powers: *State v. Regents*, 50 Wis. 170. Where there is power in reference to the subject generally, the corporation (city) may make all the contracts, and do all the acts an individual may do: *City of Memphis v. Brown*, 1 Flipp. 198, citing the principal case. Commissioners authorized to negotiate the sale of bonds, and to expend the proceeds for specified objects, are not obliged to sell the bond for cash first, and then expend the proceeds, but may, if convenient, pay out the bonds directly for the specified objects: *Cady v. Watertown*, 18 Wis. 329, citing the principal case. A banking corporation may purchase personal property at a sale on an execution in its own favor, or under a mortgage or pledge of the property taken by it as security for a loan, under the statute authorizing banks to carry on business by loaning on real and personal securities. For this authority necessarily carries with it the power to make such securities available according to the ordinary course of business: *Farmers' etc. Bank v. Detroit & M. R. R. Co.*, 17 Id. 374, citing the principal case.

INCIDENTAL POWER OF CORPORATION TO TAKE AND CONVEY REALTY: See *State v. Commissioners*, 57 Am. Dec. 409, and note 414; *Rices v. Dudley*, 67 Id. 231; *Old Colony R. R. Corp. v. Evans*, 66 Id. 394, note 405.

SUBSCRIPTION TO CAPITAL STOCK IS CONTRACT ENFORCEABLE BETWEEN CORPORATION AND SUBSCRIBER: *Selma v. Tipton*, 39 Am. Dec. 344; *Townsend v. Goewey*, 32 Id. 514; *Muskingum etc. Co. v. Ward*, 42 Id. 191; *Connecticut etc. R. R. Co. v. Bailey*, 53 Id. 181; *Penobscot R. R. Co. v. Dunmer*, 63 Id. 654, note 657.

PROMISSORY NOTE RECEIVED BY CORPORATION WITHOUT AUTHORITY is, nevertheless, valid in the hands of a bona fide assignee: *McIntire v. Preston*, 48 Am. Dec. 321.

CORPORATION HAS IMPLIED AUTHORITY TO DEAL ON CREDIT and borrow money within the sphere of its prescribed business, and also to bind itself by bills and notes: *Commonwealth Bank v. Newport Mfg. Co.*, 35 Am. Dec. 171; see also *Ohio L. I. & T. Co. v. Merchants' L. & T. Co.*, 53 Id. 742.

RAILROAD COMPANY HAS POWER TO RECEIVE FROM SUBSCRIBER, IN PAYMENT OF ITS STOCK, a promissory note secured by a mortgage on real estate, instead of being paid therefor in cash: *Lyon v. Rhinings*, 17 Wis. 66; *Andrews v. Hart*, Id. 305; *Western Bank of Scotland v. Tallman*, Id. 532; *Cornell v. Hichens*, 11 Id. 389, citing the principal case. Liability of subscriber upon such mortgage debt: See *Yard v. Mutual Ins. Co.*, 64 Am. Dec. 467.

CORWITH v. STATE BANK.

[11 WISCONSIN, 430.]

PARTY CANNOT MOVE SECOND TIME, AND ON OTHER GROUNDS, TO SET ASIDE SALE ON EXECUTION after a reversal on appeal of an order granting a former motion, unless at the time of the reversal he obtains leave from the appellate court to renew the motion.

MOTION to set aside sales on execution was made by counsel for defendant, after the reversal by this court (reported in 8 Wis. 376), of the order of the circuit court granting a similar motion, and the remission of the cause to the circuit court.

The present motion was made upon different grounds. Motion granted, and plaintiff appeals.

J. H. Knowlton and J. A. Sleeper, for the appellant.

S. Crawford, for the respondent.

By Court, *COLE, J.* Within the decisions of this court in *Pierce v. Kneeland*, 9 Wis. 23, and *Hill v. Hoover*, Id. 15, we cannot see how we can affirm the order in this case. A previous motion was made in the circuit court of Lafayette county to set aside the sales under the execution, etc., and that motion was sustained. From the order setting aside the sales, appeals were duly taken to this court, and upon the hearing of the appeals the orders of the circuit court setting aside the sales were reversed. But in reversing those orders, no leave was granted to the respondent to renew the motion in the circuit court, which we think was necessary, in order to entitle the respondent to make another application to set aside the sales. The motion now made has in view precisely the same object and purpose as the former one, based, it is true, upon new grounds. But if a second motion can be made to set aside these sales, why may not a third and fourth, and an indefinite number of motions be made for the same object, if the court should continue to deny the motions, upon the grounds upon which they are severally founded? A denial by this court of the former motion to set aside the sales must, we think, be considered as a bar to the respondent's right to make another application for the same purpose, the respondent not having obtained leave to renew that motion, on such reversal here: See the authorities cited in case of *Pierce v. Kneeland*, 9 Wis. 23.

It follows, therefore, that the order of the circuit court setting aside and vacating the sale of the real estate to the appellant must be reversed.

MOTION CANNOT ORDINARILY BE RENEWED WITHOUT LEAVE OF COURT: *Dolfus v. Froesch*, 40 Am. Dec. 368, and note 369. The principal case is cited in *Weber v. Board of Supervisors*, 47 Wis. 228, to the point that "as a rule of practice, it is well settled that leave to renew the motion after its decision must be granted, if at all, at the time of such decision, and be a part and qualification of the order on the first motion." A rehearing was granted in the principal case (15 Wis. 290), and the defendant was allowed to renew his motion on the ground that the first motion was denied (8 Id. 376) for irregularity in the moving papers, and a failure to comply with the rules of the court, and for that reason the merits were not investigated. Of this fact, the court said it was not aware at the time of the decision of the principal case. "We are now of opinion," said Dixon, C. J., "that the denial of the motion

is not a bar to the present application. It is like a judgment of nonsuit, or the abatement of an action for some error in bringing or conducting it, which have never been held to preclude the plaintiff from beginning anew. Through ignorance or inattention to rules of practice, the motion was abated for defect in the form of the papers. There is some uncertainty in the authorities, but the more just and rational rule seems to be, that it should not be a bar to a subsequent motion regularly made, even though the party do not ask and obtain formal leave to renew it: *Dollfus v. Fresch*, 5 Hill, 493, and note;” 8. C., 40 Am. Dec. 368.

MILLS v. GLEASON

[11 WISCONSIN, 470.]

RATIFICATION BY MUNICIPAL CORPORATION WILL GIVE VALIDITY TO ACTS UNAUTHORIZED at the time of their performance, because the charter had not yet been published.

CITY HAS AUTHORITY TO BORROW MONEY AND ISSUE ITS BONDS THEREFOR, in the absence of any restriction, as incidental to the execution of the general powers conferred by the charter to purchase fire apparatus, cemetery grounds, to establish markets, and to do many other things, for the execution of which money would be necessary as a means.

CORPORATIONS MAY RESORT TO USUAL AND CONVENIENT MEANS OF EXERCISING POWERS GRANTED.

MUNICIPAL CORPORATION AUTHORIZED TO CONTRACT DEBTS AND EXECUTE UNDERTAKINGS REQUIRING MONEY may borrow money for those purposes and issue its bonds or other obligations therefor without any direct statutory authorization; and the fact that on previous occasions statutes have been passed authorizing such issuances of bonds is not conclusive that the corporation has not such authority independent of statute.

CONFERRING POWER OF TAXATION UPON MUNICIPAL CORPORATION does not deprive it of the power of borrowing money.

UNDER CITY CHARTER PROVIDING THAT COMMON COUNCIL SHALL CONSENT of mayor and twelve aldermen, and that a vote to levy a tax shall be passed by two thirds of the members elect, the mayor is not to be counted in the number of which two thirds must be taken, but a two-thirds vote of the aldermen is sufficient.

TAX OUGHT NOT TO BE RENDERED INVALID BY MERE NON-COMPLIANCE WITH SOME DIRECTION OF STATUTE, notwithstanding which the tax may have been entirely just and equal, or by any objection which does not go to the very groundwork of the tax.

ACTION by Mills against Gleason, the treasurer of Dane county, to enjoin him from selling plaintiff's lands in the city of Madison for taxes of the year 1857. The taxes, it was alleged, were a cloud upon the title, and were irregular and illegal in the levying and assessment, on several grounds. Among other grounds, the tax was contended to be illegal because two thirds of the common council, consisting of the mayor and twelve aldermen, had not authorized the tax, but the tax had

been passed by the vote of only eight members, who, it was claimed, did not constitute two thirds of the council, counting the mayor. The tax was also objected to on the ground that large sums were included therein for objects and purposes for which the common council had no authority to levy a tax. These sums were for interest upon bonds issued by the city, which, it was claimed, had no authority to issue them. The items were as follows: Eight thousand dollars for interest on one hundred thousand dollars; municipal loan, one hundred bonds, of one thousand dollars each; eight hundred dollars for interest on ten bonds of one thousand dollars each, issued to Wright to pay for cemetery grounds; three thousand five hundred dollars for interest on capitol bonds to the amount of fifty thousand dollars; and twelve thousand three hundred and fifty dollars to pay other interest, or certain city orders. The bonds were issued for general city purposes, the erection of public buildings, and the like. The court below granted the injunction, and the defendant appealed upon exceptions to the findings. The opinion states the case.

S. U. Pinney, for the appellant.

Abbott and Clark, for the respondent.

By Court, PAINE, J. In the case of *Clark v. Janesville*, 10 Wis. 135, the majority of the court held that the charter of that city was a public and therefore a general law, within the meaning of the constitutional provision that no general law should be in force till published.

The charter of the city of Madison was not published until after the issue of the bonds, whose validity is questioned in this suit, and the case would therefore be governed by that decision, unless, as is claimed on the other side, the city, after it did acquire an existence as such, by the publication of the charter, did some act ratifying the issue of the bonds, so as to bind itself. This ground of objection is one of a technical character; and although it must prevail where the case comes within it, yet a stronger case could not well be presented for applying the doctrine that a subsequent ratification will render valid acts that in point of strict law were unauthorized when they were done. This is a familiar rule in the case of individuals. If a man without any authority assumes to act as the agent of another, although the act as to the other is of no validity, yet if he subsequently ratifies it, and adopts it, and receives the benefit of it, he is as much bound as though

he had authorized it in the first instance. And we think this principle applicable to this case. Here, everything was done necessary to authorize the issuing of the bonds, except the publication of the charter; all the parties, however, supposing it to be in force. If, after it was in force, the city received the proceeds, and appropriated them to its use, and recognized the validity of these bonds, we could not well imagine a case more fit for the application of this rule. And we think the following authorities fully justify its application: *Episcopal Charitable Society v. Episcopal Church*, 1 Pick. 372; *Edwards v. Grand Junction R'y Co.*, 7 Sim. 337; *Gooday v. Colchester & S. V. R'y Co.*, 15 Eng. L. & Eq. 596. In the last case, the master of the rolls, referring to the previous cases, says that they "establish the principle that whenever a third party enters into a contract with the plaintiff, and the defendant takes the benefit of it, he is bound to give the plaintiff the advantage he has contracted for." Upon looking into the cases, it will be seen that the rule was established upon these facts. The projectors of a railway company had made contracts prior to its organization, which the company, when organized, received the benefit of; and it was held that they thereby became bound by the contract. The facts in this case are similar in character, or if anything, stronger in favor of the rule, for here the parties all acted in the full belief that the charter was in force.

It appears from the evidence that the proceeds of the bonds went into the treasury of the city, and were expended by it, and that after the charter was in force, their validity was recognized by levying a tax for the payment of the interest. We think this ratifies them, and binds the city, provided it would have been bound, if the charter had been in force at the time they were issued.

But it is claimed that the city had no power to make this loan, or issue its bonds therefor. There is no special act and no provision in its charter expressly authorizing it, and it was said that without this, the power to borrow money did not exist, and could not be claimed as incidental to the execution of the general powers granted by the charter. The charter does confer the power to purchase fire apparatus, cemetery grounds, etc., to establish markets, and to do many other things for the execution of which money would be necessary as a means. It would seem, therefore, that in the absence of any restriction, the power to borrow money would pass as an

incident to the execution of these general powers, according to the well-settled rule that corporations may resort to the usual and convenient means of executing the powers granted; for certainly no means are more usual for the execution of such objects than that of borrowing money. But an argument against the right is derived from the practice which has prevailed to a considerable extent, of obtaining special acts of the legislature authorizing the procurement of loans by municipal corporations, and the issuing of bonds or other securities in payment.

We are not aware to what extent, if any, this practice has prevailed in this state, as to loans for purposes clearly municipal, and authorized by the charter; but it seems to have been resorted to sometimes, even in such cases, in other states. The argument drawn from the assumption on the part of the legislature of the necessity of such acts is one always entitled to consideration, and sometimes of much weight, though never conclusive; and we think, owing to the peculiar nature of the subject-matter, that in cases involving a loan by corporations, it is of less force than in almost any other, for capital is of a timid, jealous disposition. It delights in certainty, and is alarmed by doubts.

It has been held, with great strictness, that corporations can exercise no powers except those granted by their charter. When, therefore, the charter does not expressly give the power of borrowing money, even though it grants powers to which this might be claimed as incident, yet there is room for doubt, a chance for an argument; and that being so, it might, as a matter of policy, facilitate the loan by removing all uncertainty by an express act of the legislature. And the fact that such acts have been passed, being then clearly necessary when these corporations have been authorized to issue bonds in aid of purposes outside of their charters, may have had a tendency to induce a resort to the same practice when the bonds were issued for some purpose authorized by the charter, though in that case such legislation may not have been necessary. For these reasons, we think there is nothing in this practice sufficient to overthrow the general rule, that in the absence of restrictions, a corporation authorized to contract debts, and to execute undertakings requiring money, may borrow money for those purposes, and issue its bonds or other obligations therefor.

This question is alluded to in *Ketchum v. Buffalo*, 14 N. Y.

356, and the court held that the fact that in several other instances the legislature had expressly granted power to corporations to "purchase market lots," did not justify the conclusion that the city of Buffalo could not exercise the power as incidental to the general power of establishing a market. The court held that under that general power it might purchase the lot on credit, and issue its bonds in payment. And after carefully considering the suggestions made by the learned judge who delivered the opinion, we fail to perceive any substantial distinction, so far as the question of power is concerned, between the method there adopted and that adopted by the city of Madison in this case. True, it is there suggested that the question whether the city of Buffalo could have borrowed the money and paid for the lot, and issued its bond for the money, was a different question, though at first view "they might seem identical."

But on examining the points of distinction stated, we think they do not affect the question of power, but simply go to show that the one method of exercising it may afford less facility for a misapplication of the funds than the other. Thus it was said that if the money was borrowed to build a market, it might be used to build a theater, whereas, if the contract were directly for the market, and the bond given in payment, it would insure the application of the fund to its legitimate object. This might be a good reason why the legislature should restrict the corporation to the one method of accomplishing the object; but when the power is granted without restriction as to the means, it does not, in our opinion, justify a court in saying that while the corporation has the power of using one means, it has not that of using another, though equally direct and well adapted to the accomplishment of the object, provided the funds are honestly applied; merely because it may afford greater facility for a misapplication. They might undoubtedly be misapplied in either case. Thus, what should prevent the city of Buffalo, having purchased a lot for a market, and given its bonds for it, from erecting a theater instead of a market on the lot, if it was to be assumed that it was willing to pervert its funds and its credit to unauthorized purposes? Or, having purchased materials for a market, it might out of them erect a theater. Or, having given its bond for the purchase of a lot and the erection of a market, and then having raised by taxation the money to pay the bond, it might use the money to build the theater, leaving the bond unpaid. This

opportunity of misapplying the funds must exist under any method of executing the powers of a corporation. If one affords greater facility for it than another, the remedy is in restrictions by the legislature, and the selections of honest and capable agents by the people. But it affords no ground for a court to say that as a mere question of power, the corporation may not adopt the one method as well as the other; and it being established that a corporation may purchase upon credit such things as are necessary for the execution of its powers, we think it follows necessarily that it may borrow the money to pay for them, as that is one mode of purchasing upon credit.

Nor is the power of taxation conferred by the charter to be deemed to exclude the power of borrowing money. The case just referred to is an authority against such a proposition. It holds that, notwithstanding the power of taxation, the corporation may resort to its credit, not only for its ordinary current expenses, but for objects of a permanent character. The case of *Clark v. School District*, 3 R. I. 199, is also in point. It was there held that a school district might borrow money to pay debts contracted for the erection of a school-house, and give its note therefor, and that its power of taxation was not to be construed as forbidding it to borrow money for a legitimate purpose. *Beers v. Phoenix Glass Co.*, 14 Barb. 358, and *Mead v. Keeler*, 24 Id. 20, are also direct authorities in favor of the power of a corporation to borrow money, as incidental to the execution of its other powers. It was said on the argument that it did not appear that the moneys received were all applied to municipal purposes. It does not appear how they were all applied, but we apprehend it would not be incumbent on the lender to show that they were properly applied. If the city had power to borrow money for legitimate purposes, a misapplication of the funds after they were obtained would not invalidate the contract. In *Bigelow v. Perth Amboy*, 25 N. J. L. 297, the city had purchased a quantity of flag-stone for paving streets, and it was claimed that the charter had not been complied with, in respect to the proceedings preliminary to the paving by the city. But the court held that to be a question between the city and the lot-owners, and they add: "But as between the creditors of the city and the corporation, the only question is, whether the city agents, the mayor and council, had the power of purchasing the material in question. How the material was used, or whether it was used at all, is to the creditor a matter of total indifference."

Sc, in a recent case in England, *Eastern Counties R. R. Co. v. Hawkes*, 35 Eng. L. & Eq. 8, it was held that where the charter allowed the company to purchase lands for extraordinary purposes, a person contracting to sell them land was not bound to see that it was strictly required for such purposes, and that if he acted in good faith, without knowing of any intention to misapply the funds of the company, he might enforce the contract.

The principle of that decision would seem to warrant the proposition, that where a corporation has power to borrow money, a lender, acting in good faith, and supposing it to be borrowed for legitimate purposes, might recover, even though the corporation intended to devote it to objects unauthorized. And it would certainly sustain the position, that where it was borrowed for lawful objects, no subsequent misapplication of the funds could affect the rights of the lender, about which there is, in fact, no room even for the shadow of a doubt.

But it was objected that the tax was not levied by a two-thirds vote, as the charter requires. It was levied by a two thirds vote of the aldermen, but not of the council, including the mayor. The charter provides that the "common council shall consist of the mayor and aldermen," etc. It provides that a vote to levy a tax shall be passed by two thirds of the "members elect," and it is said that the mayor should be counted in making up the number, of which the two thirds is requisite. But we think this provision relates to the aldermen only. They are elected as members of the council, and as nothing else; they act and vote on all questions; while the mayor, although he is made by the charter one of the constituent parts of the council, yet he is so in the same sense that the vice-president is a part of the United States senate, or the lieutenant-governor a part of the senate of the state. We think he was not intended to be counted in the provision for a two-thirds vote.

It is also objected that the assessors did not meet for the purpose of hearing objections, as required by the charter. We are unable to say from the evidence that this objection is true in point of fact. It appears from the evidence on both sides that the assessors did meet, and the most that can be said is, that it does not appear that they were all present at any one time. We shall not attempt to determine what would be the effect of an entire omission of this meeting by the assessors. It is undoubtedly a matter of much difficulty, both upon prin-

ciple and upon authority, to determine with what degree of strictness the directions of the statute in regard to taxation must be followed in order to prevent the entire tax from being illegal. On the one hand, it is the evil of illegal and oppressive taxation upon the citizen; and on the other, the danger of defeating entirely the collection of the public revenue, by the neglect or omissions of the officers to whom it is intrusted.

Perhaps the only method of solving the difficulty would be to hold that no objection which did not go to the very groundwork of the tax, so as to affect materially its principle, and show it must necessarily be illegal, ought to have the effect of rendering the whole invalid; and there are some authorities which even hold that such an objection would not; though in the case of *Weeks v. Milwaukee*, 10 Wis. 242, this court gave it that effect. But when the objection is a mere non-compliance with some direction of the statute, notwithstanding which the tax may have been entirely just or equal, it ought not to have that effect. If it did, the collection of taxes would be rendered practically impossible. In such cases, the remedy must be for each one to obtain such special relief as the laws may furnish on showing the omission, and that he was aggrieved by it.

And this disposes of the objection now under consideration, and also of the one that the tax list was not returned to the county treasurer within the time required by law. Neither of them necessarily impeach the justice of the tax, and there is nothing in the case to show that the complainant was especially aggrieved by either. And we do not think he can sustain a suit in equity to enjoin the collection of a tax legal and just in itself, merely on account of such irregularities.

We will notice but one other objection, which might properly have been noticed before. It is said that the cemetery bonds were issued in violation of law. And it appears that by section 3, chapter 104, private and local laws of 1857, the city was prohibited from issuing, selling, or disposing of any bonds, except those specially authorized for the enlargement of the capitol. It might be here noticed that this statute turns the argument to be derived from the understanding of the legislature, in favor of the existence of the power previously. For passing the act to prohibit it, implies that without such act the city had the power. The same thing is necessarily implied in that provision of the constitution which requires the legislature to "restrict" the power of municipal corporations "to

contract debts, borrow money, loan their credit," etc. But the answer to this objection, that this act made the issuing of the cemetery bonds illegal, is this: it appears from the case that city had previously purchased the lot and contracted for that mode of payment. The act of the legislature then could not impair the obligation of that contract, or defeat the party's right to its specific performance.

The judgment of the county court must be reversed and the cause remanded, with directions that the complaint be dismissed.

INCIDENTAL POWERS OF CORPORATIONS: See *Blunt v. Walker*, *ante*, p. 709, and note.

DEFECTIVE ASSESSMENTS: See note to *People v. Seymour*, 76 Am. Dec. 521.

NO OBJECTION WHICH DOES NOT GO TO VERY GROUNDWORK OF TAX, so as to affect materially its principle, and show that it must be necessarily unjust and unequal, ought to have the effect of rendering the tax invalid: *Warden v. Supervisors of Fond du Lac County*, 14 Wis. 621; *Hersey v. Board of Supervisors*, 16 Id. 194; *Smith v. Smith*, 19 Id. 619; *Hart v. Smith*, 44 Id. 218; *Kaehler v. Dobberpuhl*, 56 Id. 483; *City of Delphi v. Bowen*, 61 Ind. 33, citing the principal case. But where a valid objection is common to all or much of the property, or goes to the rule or to the whole process of assessment, it must operate to avoid the whole tax levied on the assessment: *Marek v. Supervisors*, 42 Wis. 511, citing the principal case.

POWER TO BORROW MONEY IS INCIDENTAL TO MUNICIPAL CORPORATION: *Bank of Chillicothe v. Chillicothe*, 30 Am. Dec. 185, note 190-194. A municipal corporation has the authority to borrow money as an incident to the execution of the general powers conferred upon it which require money in their execution: *Miller v. Board of Commissioners*, 66 Ill. 167; *Bicknell v. Widner School Township*, 73 Id. 504, citing the principal case. The principal case is also cited to the point that laws authorizing municipal aid to railroads are constitutional: *Talcott v. Township of Pine Grove*, 1 Flipp. 138; and that municipal bonds under seal, payable to bearer, are negotiable: *City of Memphis v. Brown*, Id. 217.

CITY MAY, BY RATIFICATION AND ADOPTION, BECOME BOUND, when it would otherwise not be bound: *Hasbrouck v. Milwaukee*, 13 Wis. 48; *Supervisors v. Schenck*, 5 Wall. 782, citing the principal case. In *Clark v. Jonesville*, 13 Wis. 418, the principal case is distinguished on the ground that in the principal case the city was authorized to issue the bonds, had the charter been published, and could therefore ratify the act after the publication of the charter, while in that case the city was not originally authorized, and could not therefore ratify.

THE PRINCIPAL CASE IS CITED to the point that very many acts which are in their nature local are yet held to be general within the meaning of the provision of the constitution that no general law shall be in force until published: *Yellow River Improvement Co. v. Arnold*, 46 Wis. 222; and to the point that a village charter is a public or general law: *Zitake v. Goldberg*, 38 Id. 223.

DOWNIE v. HOOVER.

[12 WISCONSIN, 174.]

RAILROAD COMPANY, IN CARRYING OUT ENTERPRISE authorized by its charter, has power to assign its stock subscriptions.

THE complaint showed that defendant had subscribed for five shares of the capital stock of a certain railroad corporation; that all the conditions upon which he was to pay had been performed; that said corporation, for a valuable consideration, had duly assigned the same to plaintiff; that the whole sum so subscribed had become and now is due, etc. Defendant demurred to said complaint, on the ground that the plaintiff had no legal capacity to sue, and that the complaint did not state facts sufficient to constitute a cause of action. The court entered its order sustaining the demurrer, and from this order the plaintiff appealed.

Adams and Pitkins, for the appellant.

Coon and Cotton, for the respondent.

By Court, PAINE, J. The single question presented on this appeal is, whether a railroad company, in carrying out the enterprise authorized by its charter, has any power to assign its stock subscriptions. We think it has the power. A stock subscription is nothing but a contract, by which the subscriber is bound to pay the company certain amounts. It would clearly be assignable as between individuals, and we can see no reason why it should not in the case of a corporation, acting in execution of the powers conferred by its charter.

The fact that a company may abuse its power, and make contracts ruinous to itself and to the value of its stock, does not seem to be a sufficient reason for denying the power. For they may, undoubtedly, do this, whether this power of assignment exists or not. They may make extravagant contracts for materials, for land, and for labor in building the road, and thus make their stock worthless, as often happens. They become insolvent, receivers are appointed, who may compel the payment of unpaid stock subscriptions, for the benefit of creditors, created by these extravagant and ruinous contracts.

The fact, therefore, that a company may ruin itself by indiscreet contracts, if such an assignment is allowed, is no reason against the power; for it may ruin itself by such contracts without such a power.

At all events, even though it might be a reason for the legis-

lature to impose a restriction, it is no reason for the court, where the charter contains no such restriction, but gives the general power to make all contracts which the convenience or interest of the company may require, to deny the power to make this particular contract. The reasoning in the case of *Clarke v. Farrington*, 11 Wis. 306, decided at this term, is applicable to the question. The order of the court below sustaining the demurrer is reversed, with costs, and the cause remanded for further proceedings.

RAILROAD COMPANY MAY ASSIGN SUBSCRIPTIONS FOR ITS STOCK. The principal case is cited, approved, and followed in the following cases: *Downie v. White*, 12 Wis. 176; S. C., *infra*; *Racine Co. Bank v. Ayres*, 12 Wis. 518; *Kimball v. Spicer*, Id. 670.

CORPORATIONS HAVE POWER TO CARRY OUT OBJECTS for which they are formed, by all legal and necessary means not prohibited by law or by their respective charters: *P. & S. R. R. v. Lewis*, 75 Am. Dec. 574. The same principle is recognized in *Coe v. O. P. & I. R. R.*, Id. 518, and note 550; *Abby v. Billings*, 72 Id. 143, and note 148; *Old Colony R. R. Corp. v. Evans*, 66 Id. 394.

DOWNIE v. WHITE.

[12 WISCONSIN, 176.]

CASE OF DOWNIE v. HOOVER, ANTE, p. 730, followed as to right of railroad company to assign stock subscriptions.

SECRET AGREEMENT WITH RAILROAD COMPANY THAT STOCK SUBSCRIPTION OF DEFENDANT WAS MERELY TO BE COLORABLE is a fraud upon other subscribers for stock, and is not a defense. The written subscription should be enforced without regard to such secret agreement.

CONTEMPORANEOUS PAROL UNDERSTANDING CANNOT BE SET UP to contradict or vary the terms of a written agreement.

THE complaint in this case is exactly like the one in the preceding case of *Downie v. Hoover*. Defendant answered, putting all the allegations of the complaint in issue. It also interposed as a defense that the defendant had a secret agreement with the railroad corporation that his subscription was to be colorable only. Judgment for defendant. Plaintiff appeals.

Adams and Pitkins, for the appellant.

Levi Hubbell, for the respondent.

By Court, PAINE, J. This case presents the same question as that decided in *Downie v. Hoover* [ante, p. 730], which must be here decided in the same way.

In this case, however, an answer was filed and a trial had. But we do not think the secret understanding which the defendant sets up, to the effect that his subscription was to be merely colorable, nor the evidence offered showing an understanding of a similar kind with other subscribers, constitutes any defense whatever. Such agreements are an obvious fraud upon the other subscribers, and the written subscription should be enforced, without regard to them: *Brouwer v. Appleby*, 1 Sandf. 170; *Redfield on Railways*, sec. 48, note 1; *Blodgett v. Morrill*, 20 Vt. 509; *White Mountain R. R. v. Eastman*, 34 N. H. 124.

The third paragraph of the defendant's answer is liable, also, to the objection that it sets up a contemporaneous parol understanding inconsistent with the terms of the written agreement.

The judgment must be reversed, with costs, and the cause remanded for a new trial.

ORAL TESTIMONY IS INADMISSIBLE to vary the terms of a subscription to railway stock: *Martin v. P. & G. R. R. Co.*, 73 Am. Dec. 713, and note 722; *C. & P. R. R. Co. v. Bailey*, 58 Id. 181. To prove fraud, the rule is different: *Martin v. P. & G. R. R. Co.*, *supra*, and note.

CONTRACTS OF SUBSCRIPTION FOR STOCK of corporation are governed by a different rule than that governing private contracts: *Martin v. P. & G. R. R. Co.*, 73 Am. Dec. 713.

CORPORATE EXISTENCE may be proved by the introduction of certificate of incorporation; but where the statute requires certain formalities to be observed, they must be shown to have been observed: *Mokelumne Hill Mining Co. v. Woodbury*, 73 Am. Dec. 658.

STOCK SUBSCRIPTIONS, MADE WITH SECRET UNDERSTANDING that varies them are a fraud upon the other subscribers, and bind the fraudulent subscribers to the responsibilities of *bona fide* subscribers: *Robinson v. P. & G. R. R. Co.*, 72 Am. Dec. 792, and note 795. To this point, the principal case is cited in *Comrth v. Culeer*, 69 Ill. 506; and *Melvin v. Lamar Ins. Co.*, 80 Id. 458; *Wight v. Shelby R. R. Co.*, 63 Id. 522, and note 526.

EXISTENCE OF CORPORATION PLAINTIFF, and its capacity to sue, are admitted by pleading the general issue: *Inhabitants v. Wedgewood*, 69 Am. Dec. 81, and note 83; *W. W. S. Bank v. Ford*, 71 Id. 66.

QUESTION OF EXISTENCE OF CORPORATION should be raised by a plea in abatement, and cannot be raised under the general issue: *W. W. S. Bank v. Ford*, 71 Am. Dec. 66, and note 70.

POWERS v. BEARS.

[12 WISCONSIN, 212.]

BEFORE PUBLIC CAN EXERCISE RIGHT OF EMINENT DOMAIN against the will of an owner of property, and acquire a right of entry thereon, the value of the property to be taken must be ascertained by some legal and proper proceeding, and be paid; and if such value, thus ascertained, be not paid to or received by the owner, an adequate and safe fund must be provided. from which he may be compensated.

IN EXERCISING RIGHT OF EMINENT DOMAIN, the state cannot provide by law that an agent of a railroad company which desires to condemn a right of way, and two disinterested persons selected by the company, may appraise the value of the land to be taken, nor can the state authorize such company to enter upon said land upon the refusal of the owner to accept the value of it as fixed by such appraisers. Such a law is unconstitutional, because it takes property without due process of law.

INJUNCTION IS PROPER REMEDY to prevent the exercise of a power granted by a law in contravention of the provisions of the constitution.

WHEN RIGHT OF EMINENT DOMAIN is exercised, the commissioners to fix the damages to a person, suffered by reason of the appropriation of his property for a public use, should be fair and impartial men, indifferently chosen between the parties, and each party should be given a fair opportunity to appear before them, and make such proofs and statements as may be proper.

ACTION to restrain a railroad company from entering upon the land of plaintiffs for the purpose of constructing a railroad. The facts are stated in the opinion.

Bouck and Edmonds, for the appellants.

Wheeler and Coolbaugh, for the respondents.

By Court, DIXON, C. J. We do not feel called upon in this case to enter into a discussion of the question as to the time when the owner of private property taken for public use shall be compensated therefor, to which counsel devoted much attention, and the repeated and thorough examinations of which by the courts of our sister states have produced a variety of conflicting and irreconcilable opinions and decisions, for the reason that we regard it as substantially settled, in a manner entirely in harmony with our own views, by the former adjudications of this court. In the case of *Norton v. Peck*, 3 Wis. 714, it was held that the officers of a town could not enter upon and appropriate to public use the land of an individual, required for a highway, unless compensation therefor was first made, or unless proper proceedings were first taken by the authorities of the town to ascertain its value, so that he could receive it when called for. In that opinion. the court say that

in the case of land taken by the authorities of a town, they do not decide that actual prepayment of the damages in money is necessary, for the reason that the entire taxable property of the town constitutes an adequate fund to which the owner may, without risk of loss, resort to compel payment. In the subsequent case of *Shepardson v. Milwaukee & B. R. R. Co.*, 6 Wis. 605, the distinction between public or municipal corporations and corporations merely private, as instruments in the hands of the legislature by which it may exercise the right of eminent domain, in respect to the fund to which the owner may resort, is particularly noted, and it is observed that although in theory the property in both cases is taken by the public, yet in the former case all the taxable property in the town is pledged for the payment of the value, while in the latter the uncertain and oftentimes worthless responsibility of the corporations can only be looked to. In speaking of the case of *Norton v. Peck*, 3 Wis. 714, the late chief justice says: "As in that case we held it indispensable that the compensation should be made for the property taken, without driving the owner to a suit at law to ascertain its value, or at least that the town authorities should proceed to ascertain the value of the land taken, before appropriating it to the use of the public, so that the owners should be able to recover its value from the property of the town, we must in this case hold that the railroad company cannot enter upon the plaintiff's land and apply it to the use of the road, without making compensation and without taking any measures to ascertain the damages which the plaintiff has sustained by their acts."

In the still later case of *Robbins v. Milwaukee & H. R. R. Co.*, 6 Wis. 636, much stronger language was used by the court. It was said that when the government "takes land, by virtue of its sovereign right and power, it is bound by the constitution to pay the value thereof, at the time it is taken." Setting to the one side the adjudications of this court upon the mill-dam law, so called, which was sustained contrary to the individual convictions of all its present members, on the ground that the earlier decisions upon it had made it a rule of property which could not, with a due regard to individual interests, be departed from, we are of opinion that the cases above referred to conclusively establish that one of two things must invariably be done before the public can, against the will of the owner, acquire the right to enter upon and permanently occupy his land, which may be needed for public uses: 1. The

value of the property to be taken must be ascertained by some legal and proper proceeding, and be paid; or 2. If the value thus ascertained be not paid to or received by the owner, an adequate and safe fund must be provided, from which he may at some future time be compensated.

These, it seems to us, are the results of those cases, and they are such as we should be unwilling to depart from. The latter proposition, in the case of a private corporation, like a railroad company, would undoubtedly require it to tender or offer in money the amount of the ascertained damages, or compensation with expenses, if any, to the owner or person interested, and if, on the ground of an intended appeal or otherwise, he should refuse to receive it, the company would be required to deposit the same with some proper officer or person, to be kept good for the owner until the end of the litigation, or until such time as he should apply for and signify his readiness to accept it.

With these rules, as to the requirements of the constitution, already fixed, it remains only to be determined whether the statute under which the railroad company proceeded in this case, and the steps taken by it to acquire the right to the permanent use and occupation of the plaintiffs' land, are in compliance with them. The statute, section 2, chapter 168, laws of 1859, provides: "The company, by its agent, shall first offer to pay to the owner or owners, guardian of the owner, or agent of the owner or owners, or of any other person having any interest in such lands (as the case may be), if resident of this state, such sum as such agent, and two disinterested freeholders of the county where the lands are situated, shall, on oath, and in writing, swear is just compensation for such lands and damages, before seizing and appropriating any such lands, in all cases where lands have not already been appropriated." Having complied with this provision, the company attempted to take permanent possession of, and to build and construct its road through, the land in question. To prevent its so doing, the plaintiffs, who refused to receive the money offered, commenced this action against the defendants, who were the agents or contractors having charge of the work, and procured therein a preliminary injunction, which, on motion of the defendants before the court at term, was dissolved. From the order dissolving the injunction this appeal is taken. It must be very evident to every impartial mind that such a proceeding, to ascertain the value of the land to be taken, and to determine the

damages which the owner shall be entitled to receive, if sustained, would be a mere evasion of the provisions of the constitution, as heretofore expounded by this court. It is open to the grossest partiality and abuse. It is *ex parte* and secret.

The board of appraisers, who are to sit in judgment on the rights of the parties, are chosen by one of them, in the absence and without the knowledge or consent of the other. One of its members is the agent and employee of the company, through whom it exercises its power of choosing the other two. They act without evidence, and their sessions are not public. As a proceeding to ascertain and determine the rights of the landowner, it is a mere mockery, equivalent to making one of the parties to a controversy a judge or trier between himself and his adversary, and ordaining that the trial shall take place in the absence and without the knowledge of the latter, or equivalent to saying that the railroad company may enter into the permanent and peaceful enjoyment of the land without any compensation whatever. No one will say that such a proceeding is a compliance with the constitution, or that it can be tolerated. The commissioners to value the land and ascertain and determine the damages, as contemplated by that instrument, are to be fair and impartial men, indifferently chosen or appointed between the parties, and their investigation is to be open and known to both, giving to each an opportunity to appear before them and make such statements and offer such proofs as may be necessary and proper. Until such a proceeding has been had, and the corporation have complied with their award or decision in the manner above indicated, it has no right to the permanent occupancy of the land, for the purpose of constructing its road. It may also be observed that no provision is made for depositing or keeping good the money offered to the owner pursuant to such unjust and anomalous assessment. To the question as to whether a writ of injunction is a proper remedy in a case like the present, in addition to the authorities cited by the appellants' counsel, *Shepardson v. Milwaukee & B. R. R. Co.*, 6 Wis. 605, is directly in point. In that case, an injunctive order restraining the company from the occupancy of the plaintiff's land, and the prosecution of the work in constructing their road over the same, was dissolved by the judge at term, and on appeal to this court the order dissolving the injunction was reversed.

The order of the circuit court must be reversed, and the case remanded for further proceedings.

POWER OF EMINENT DOMAIN is the power of the state to take private property for a public use: *Donnelly v. Decker*, 58 Wis. 467, citing the principal case.

INJUNCTION TO PREVENT UNLAWFUL TAKING OF PROPERTY for public use: *Bensley v. M. L. W. Co.*, 73 Am. Dec. 575; *Gause v. Perkins*, 69 Id. 723, and note 733; *Bird v. Wilmington etc. R. R.*, 64 Id. 739, and note 746.

INJUNCTION IS PROPER REMEDY TO PREVENT RAILROAD COMPANY from taking possession of land for a right of way, unlawfully: *Bohlman v. Green Bay etc. Railway*, 30 Wis. 107, citing the principal case. The principles noted above are discussed in *Kennedy v. Milwaukee and St. Paul R. R. Co.*, 22 Id. 590, and the principal case is cited and distinguished.

WHERE CITY IS INSTRUMENT OF STATE IN EXERCISING ITS RIGHT OF EMINENT DOMAIN, actual payment of damages prior to the appropriation of the land need not be made, because all the property in such city is liable for the payment of damages caused the land-owner by the appropriation, and constitutes a fund for its payment when ascertained: *Smeaton v. Martin*, 57 Wis. 374, citing the principal case.

PRIVATE PROPERTY CANNOT BE TAKEN FOR PUBLIC USE, without first paying or securing to the owner just compensation therefor: *Bensley v. M. L. Water Co.*, 73 Am. Dec. 575, and note 583, 584.

NO PERMANENT APPROPRIATION of land can be made by a railroad company in acquiring a right of way for its road, without actual payment of the damages occasioned thereby to the owner of the land, or by tendering the same to him: *Loop v. Chamberlain*, 20 Wis. 139; *Sherman v. Railroad*, 40 Id. 649; *Brock v. Hiesen*, Id. 681; *Bohlman v. Green Bay and Lake Pepin Railway Co.*, 30 Id. 107; *Church v. Joint School Dist.*, 55 Id. 404, all citing the principal case.

FISK v. TANK.

[12 WISCONSIN, 276.]

WHERE COMPLAINT CONTAINS ALLEGATIONS OF SEVERAL BREACHES OF SAME CONTRACT, in the same count, a motion to compel the pleader to elect upon which of the claims stated he will proceed and to abandon the others should be overruled. Such motion should be granted only when the complaint contains several causes of action improperly blended.

FAILURE TO STATE VENUE OR PLACE OF TAKING OF DEPOSITION, either in the margin of the deposition or in the certificate of the officer before whom it is taken, will not invalidate it.

DEPOSITION TO BE ADMISSIBLE must be taken in the regular course of judicial examination, the witness must first be sworn, the questions must be put to him, and the answers, orally given, must be reduced to writing at the time of the examination, not prior thereto. The fact that the writing is done by the witness will not vitiate the deposition. If it is written by the witness, it will be presumed that he did it in the presence of and by direction of the officer taking the deposition.

PAPER ANNEXED AS EXHIBIT TO DEPOSITION IS NOT PART OF IT within the meaning of a statute which provides that depositions "shall be written by the magistrate, or by the deponent, or by some disinterested person, in the presence and under the direction of the magistrate;" hence if such

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an exhibit is in the handwriting of a party to the action, it does not fall within the prohibition of that statute.

UNLESS ORIGINAL INSTRUMENT IS LOST, DESTROYED, OR OTHERWISE PROPERLY ACCOUNTED FOR, a copy of it, used as an exhibit, and attached to the deposition of a witness, and as such is offered in evidence, should not be received as such by the court. If, however, the witness is a party, and the fact of partnership between himself and his co-defendant is admitted by the pleadings, and he in his deposition admits such copy to be a true copy, it may then be offered as an admission of one of the partners, concerning a partnership transaction, and such admission will bind the partnership.

EXISTENCE OF PARTNERSHIP MUST BE DENIED, if it is alleged in the complaint, within the time limited by statute by affidavit, or the truth of the allegation is deemed admitted.

OMITTING FROM PLEADING PORTION OF CONTRACT WHICH IS DECLARED UPON is not a material variance between the allegations and proof, unless it shall actually mislead the adverse party to his prejudice in maintaining his action or defense upon its merits. At common law, variances of this kind were fatal, but the rule has been changed in Wisconsin by statute, and the court may order the pleading amended so as to conform to the facts, upon such terms as may be just, or it may disregard it altogether.

IN EXECUTORY CONTRACTS TO FURNISH ARTICLES FOR SPECIFIC PURPOSE, there is an implied warranty that the article delivered shall answer the purpose for which it is designed, inasmuch as the purchaser has not an opportunity of inspecting or testing it. If found defective, he may return it in a reasonable time, and recover its price if paid.

IN CASE OF WARRANTY, DIRECT OR IMPLIED, if the article purchased proves defective or unfit for the use intended, the purchaser may, without returning, or offering to return it, and without notifying the vendor of its defects, bring his action for the recovery of damages, or if sued for the price, may set up and have damages allowed to him by way of recoupment from the sum stipulated to be paid.

IN CONSTRUING CONTRACT which provides that certain machinery shall be set in position by a specified time, and if any of it should prove defective, or in any manner fail to answer the purposes intended, on a trial of twenty days, the manufacturer should make it good by repairing the defects, it was held by the court that without such a provision the vendor could not, as a matter of right, repair defects in the machinery after it was delivered to the purchaser, nor could the latter require him to repair it; that after the expiration of the twenty days such rights ceased; nor was the vendee bound to give the vendor notice of defects discovered after the twenty days expired. His right of action for damages accrued to him from a breach of the contract, if defective machinery had been delivered, and a failure to remedy such defects within the twenty days mentioned in the contract. The vendee need not repair, or even use the machinery, to enable him to avail himself of his right to damages.

WHERE BREACH OF WARRANTY THAT MACHINERY SHOULD BE PUT INTO STEAMBOAT, "adapted for and suitable for the boat," is claimed in a suit, and plaintiff offers proof tending to show that it did not answer the purposes intended, the defendant may prove in rebuttal that it was the weakness of the boat, and not defective machinery or unskillful workmanship, which caused the failure in the operation of the machinery.

STIPULATION IN CONTRACT IS NOT WARRANTY OF STRENGTH OF BOAT, by a party to such contract, when it provides that such party will furnish to the other party to such contract, and place in a certain steamboat, machinery adapted to and suitable for the boat, and that would drive her from twelve to fifteen miles per hour. The vendee of the machinery is to furnish suitable machinery, but the vendor takes the risk of the boat being strong enough to endure the weight, shock of running the machinery, and of its friction when in motion.

MEASURE OF DAMAGES, WHERE THERE HAS BEEN BREACH OF WARRANTY to furnish machinery for a steamboat, is the difference in value between the machinery furnished and that called for by the contract, adding thereto an allowance for any expense plaintiff may have incurred in his business because of the breach of warranty. To this, also, interest may be added.

THE complaint alleges that Tank and Verbeck were partners under the name of Howard Foundry; that in the name of such foundry, they contracted with plaintiff to construct and set up on a certain steamboat certain machinery, etc., of sufficient power to propel said boat on the waters of Green bay and Fox river from twelve to fifteen miles per hour, and to be in all respects suitable for propelling said boat on said waters, for which it was expressly designed and built by plaintiff, and to have the same completed and ready for use on August 1, 1855. It then proceeds to allege a breach of the contract. That defendants, Tank and Verbeck, failed to get said machinery in place, etc., until April, 1856, and lays his damages for the loss of the use of said boat and loss of its earnings, at five thousand two hundred and twenty-four dollars. That the machinery was defective, etc., and plaintiff expended in repairing, etc., one thousand two hundred and fifty dollars, also three thousand dollars for new machinery to replace the worthless machinery put in by defendants; one thousand dollars for the necessary alteration to said boat to enable the new to be set up therein. That relying upon defendants' promises to complete said work, etc., by August 1, 1855, he employed officers and hands on said boat and was obliged to pay them, during the time it was thus unemployed, for wages and board, one thousand dollars. Tank answered and denied the partnership, alleged that the contract was Verbeck's personal contract, and set out the contract particularly and putting everything alleged in the complaint in issue except the fact of partnership. The statute required this to be denied by an affidavit, and defendant failed to do this. The plaintiff offered in evidence a deposition of defendant Verbeck taken in New York before a commissioner for Wisconsin, residing in the former state. No

place of the taking of said deposition was mentioned in it, or in the certificate of the officer. The venue was not stated. Three exhibits were annexed to the deposition and were marked "A," "B," and "C." A was in the handwriting of the witness; B was a copy of contract between witness and defendant Tank, also in the handwriting of the witness; C was a written statement signed by the witness of the terms of the verbal contract made by plaintiff with witness acting for the Howard Foundry. This paper was all in the handwriting of plaintiff, except the signature. Defendant Tank objected to the admission of this evidence: 1. Because there is no venue to to the deposition; 2. Because the deposition does not state where it was taken; 3. Because witness could not be indicted for perjury; 4. Because the deposition was in the handwriting of the witness; 5. Because interrogatories are not propounded to the witness by the commissioner; 6. Because part of the deposition is in the handwriting of plaintiff; 7. Because copies are attached to the deposition while no attempt is made to account for the originals. The objections were overruled and the deposition was read. Defendant excepted. Plaintiff offered evidence tending to prove that the machinery did not work because of defects therein, and because it was not properly made and erected. In rebuttal, defendant offered evidence tending to prove that the cause of the failure was the weakness of the boat itself, and not by reason of any defect in the machinery. The amount of damages was proved as alleged in complaint. Verdict and judgment were for plaintiff. Defendant Tank appealed. Other facts are stated in the opinion.

John C. Neville and E. H. Ellis, for the appellant.

James H. Howe, for the respondent.

By Court, DIXON, C. J. The appellant's application to the court to compel the respondent to elect upon which of the claims stated in his complaint he would proceed, and to abandon the residue, was properly denied by the court. The complaint is not, as seems to have been supposed by the appellant's counsel, either double or multifarious. It does not contain a statement of several distinct causes of action improperly blended together, or of separate injuries to different chattels, or separate demands upon different contracts, as upon two or more promissory notes, or a note and book-account, or the like, but it proceeds for damages for several breaches of one con-

tract. It is obvious that in such a case, the plaintiff may, either at common law or under the code, in a single statement or count, allege as many breaches as he chooses, and when he comes to the trial, be permitted to give evidence concerning any or all of them.

The deposition of the defendant Verbeck was properly admitted. The want of a venue or statement of the place where it was taken, either in its margin or the certificate of the commissioner before whom it was taken, does not invalidate it. It is said that, without such statement, perjury cannot be assigned upon it. The authorities cited by the respondent's counsel clearly establish the contrary. They show that upon a trial for perjury, when the venue is wrongly stated in the affidavit or deposition, such written statement may be disproved, and the true place of administering the oath may be shown by parol testimony. Such recital is not so much a part of the deposition or affidavit as to make it conclusive, but is *prima facie* evidence merely. *A fortiori* the true place may be shown where there is no recital: *King v. Emden*, 9 East, 437; *Rex v. Spencer*, 1 Car. & P. 260; S. C., 12 Eng. Com. L. 157. For all ordinary purposes, the place of taking sufficiently appears on the face of it and the accompanying papers. In this respect, it is in strict compliance with the rule (61 Old Rules), which requires the return to state the time when the testimony was taken; but makes no reference to the place where it was taken. The objection that the deposition was reduced to writing by the deponent, instead of the commissioner, is not supported by the authorities cited. They only establish what is alike consistent with reason and justice, that depositions, to be admissible, must be taken in the regular course of judicial examination; that the witness must be first duly sworn, and the questions put to him, and that his answers orally given must be reduced to writing at the time of the examination; and that if they be not so taken on oath, but are reduced to writing in advance of such examination, by the deponent, the party, or some third person, or are copied from such previously written statement, they must be rejected. We are not aware that it has been held by any court that the reduction to writing by the deponent, of his answers orally given, vitiates the deposition.

On the other hand, two of the cases cited, *Carmalt v. Post*, 8 Watts, 406, and *Clement v. Hadlock*, 13 N. H. 185, expressly sanction it. We can see no objection to it. Some courts have

even gone as far as to hold that it is no objection to the competency of a deposition that it is in the handwriting of the party or his agent; that it will be presumed to have been so written in the presence and under the superintendence of the magistrate: *Ray v. Walton*, 2 A. K. Marsh. 71. This is going much further than is necessary to sanction the admission in the present case, and further, perhaps, than we would feel warranted in going. Our legislature, in prescribing the method of taking depositions of witnesses within this state (Stats. 1849, c. 98, sec. 16; Stats. 1858, c. 137, sec. 16), seem to have laid down a wholesome rule upon the subject—that they shall be written by the magistrate or by the deponent, or by some disinterested person, in the presence and under the direction of the magistrate.

The objection that a part of the deposition is in the handwriting of the respondent is unfounded in fact. The exhibits or papers annexed, strictly speaking, form no part of the deposition. The deposition, that is, the oral testimony of the witness as taken and reduced to writing, may be admitted, and the exhibits, if there be anything in their character which renders them incompetent, may be excluded. The exhibit marked "B," being a copy of the original contract, the non-production of which was not sufficiently accounted for, was improperly admitted. As to the other exhibits, there seems to have been some confusion of ideas, owing to the mixed relation of party and witness in which the deponent Verbeck stood to the action. As a mere witness, there can be no doubt that such statements, whether offered in the form of exhibits annexed to a deposition, or in some other manner, are inadmissible. But in his character of a party to the suit, with the fact of partnership between him and the defendant Tank not open to investigation, but admitted by the pleadings, they were properly received as admissions in writing of the nature and extent of the contract. For this purpose, the admissibility of a paper signed by him is not affected by the fact of its having been written by the opposite party, and such circumstance would, at most, go only to the degree of credit to be given to it, according to the nature and circumstances of the transaction. For the rule as to admissions by partners, see *Collyer on Partnership*, sec. 423, and authorities there cited.

The appellant by his failure, within the time prescribed by law for an answer, to deny, by affidavit, the existence of the partnership as alleged in the complaint, in accordance with

the provisions of section 90, chapter 98, statutes of 1849 (Stats. 1858, c. 137, sec. 98), must be deemed to have admitted it. The statute declares that, in the absence of such denial, such averments shall be taken to be true. This court (*Whitman v. Wood*, 6 Wis. 676) has so decided; and agreeably to that decision it only remained for the respondent to prove the making of the contract by the firm.

The only other question material to be noticed before we come to the merits of the controversy is that of variance, which was raised on the motion for a nonsuit. It consists in the pleader's omission to allege in the complaint a part of the contract by which it was agreed that if the work should in any manner fail to answer the purposes intended or prove defective, on a trial of twenty days, under an engineer of Verbeck's approval or furnishing, it was to be made good by repairs of defects. The contract, in all other respects, is stated truly. Under the system of pleading and practice which prevails at the common law, there can be little doubt that this failure to prove the contract as laid would be fatal. But under the system now established by law, more liberal as well as more just rules obtain, and actions are not to be defeated by slight variances or imperfections in the pleadings. It is declared by statute, section 33, chapter 125, that "no variance between the allegation in a pleading and the proof shall be deemed material, unless it shall actually mislead the adverse party to his prejudice in maintaining his action or defense upon its merits. Whenever it shall be alleged that the party has been so misled, that fact shall be proved to the satisfaction of the court, and in what respect he has been misled; and thereupon the court may order the pleading to be amended upon such terms as may be just." By the next section, it is enacted that "when the variance is not material as provided in the last section, the court may direct the fact to be found in accordance with the evidence, or may order an immediate amendment without costs." It is not contended that the appellant was in any manner misled or taken by surprise. Indeed, the case shows that he could not have been, for it appears that a copy of the contract, as proved, was served upon his attorney some months before the trial. It was, then, clearly a case of immaterial variance, which the court, under the section last quoted, might disregard, or order an immediate amendment without costs, in its discretion. It decided to pursue the former course, and over that decision we have no control.

Many of the principles applicable to the merits of this case have been heretofore settled in this court, and it will, therefore, be unnecessary for us to consider them with reference to the adjudications of other states. In the case of *Gatey [Getty] v. Rountree*, 2 Chand. 28 [54 Am. Dec. 138], the following points were decided: 1. That in executory contracts to furnish articles for a specific purpose, especially by manufacturers, there is an implied warranty that the article delivered shall answer the purpose for which it was designed, inasmuch as the purchaser has not an opportunity of inspecting or testing it; 2. That in case of a warranty, direct or implied, where the article purchased proves defective or unfit for the use intended, the purchaser may, without returning or offering to return it, and without notifying the vendor of its defects, bring his action for the recovery of damages, or if sued for the price, may set up and have such damages allowed to him by way of recoupment from the sum stipulated to be paid.

These points were fairly raised, and as we think, correctly decided. There was another point, however, not involved in the case, upon which the court attempted to rule, to which we do not wish to give our unqualified assent. It was said that where there is a warranty but no fraud, the vendee is not entitled, against the will of the vendor, to return the article and recover back the price paid; that in such case his only remedy is by suit for damages, or by recoupment, in case he is sued for the purchase-money. As applied to the facts of that case, provided the court had been called upon to determine whether the defendants had the right, at the time the action was commenced, to return the pump about which the suit arose, such decision might have been correct. There is, however, much reason for saying, and many respectable authorities hold, in respect to executory contracts particularly, that in addition to the remedies above stated, the vendee may, in case the warranty be not complied with, altogether refuse to receive the article; or may take and keep it for such time only as may be necessary for a fair examination, and then return it on discovering its defects; in which case, he is not considered as having received it at all; and in either case, if he has paid for the same, may sue for and recover back the price: See note to *Cutter v. Powell*, 2 Smith's Lead. Cas., 5th ed., 32, and cases there cited. Upon this point, we wish to express no opinion. We desire merely to reserve it. It was entirely outside of the case then before the court, and is equally so now; and there-

fore could not be adjudicated in either. No return, or offer to return, the article purchased was there made, and no rights thereupon claimed; and the same is true here. With this exception, the decision meets our entire approval. The opinion exhibits a clear understanding and just discrimination of the authorities, and renders an examination of them here, upon the points properly determined, entirely unnecessary. This disposes of a large number of exceptions taken by the appellant's counsel not necessary to be enumerated here, which are founded upon the supposed want of a return or offer of the machinery to the appellant, or of notice to him of its defects.

This case is not analogous to those cases, to some of which we have been referred, where, by the stipulations of the contract, or the course of dealing between the parties, the vendee is bound within a specified or reasonable time to return the property, with his dissent, or to keep it on the terms of the offer. In such transactions, the failure to return according to the terms of the agreement is an election to keep the property at the price agreed, and a waiver of all claim to damages on account of defects. Such was not the agreement between these parties. The sale in the first instance was absolute, provided the respondent chose so to consider it. His right to recover damages does not depend at all upon his returning, or offering to return, the articles purchased. If he could have done so, it would only have been necessary for the purpose of enabling him to recover back the purchase-money paid, and of relieving himself from future payments. He seeks neither of these things, but merely asks compensation for the losses sustained by a breach of the warranty.

There is another question with which the case seems to have been unnecessarily burdened, and from which we desire to relieve it as early as possible. It seems to have been supposed by both sides that the respondent's right to recover depended in some way upon his neglect to call upon the defendants to make repairs, or their refusal to do so. With this idea, proofs were offered, some of which were received and some rejected; instructions were asked, which were in part given and in part refused; and many exceptions were taken. If we rightly understand the contract, all these matters which had reference to the transactions between the parties after the expiration of twenty days from the time of the setting up and delivery of the machinery, were entirely foreign to the controversy. After this period, the contract seems to have been treated as if it

were still executory on the part of the defendants. This was clearly wrong. The terms of the agreement are too plain to be misunderstood. It was completely executed on the part of the defendants, when the machinery was set up and delivered, except so far as they reserved the right to repair, if the work upon trial in the manner specified proved defective, the time for which was expressly limited to the period of twenty days. Without this stipulation, the defendants would not have had the privilege of repairing, nor could the plaintiff have required it of them. The rights and obligations flowing from the stipulation were limited to defects discovered during the time fixed for the trial of the machinery. Thereafter the defendants were no more bound to repair the machinery than any stranger would have been, and the plaintiff was absolved from all duty of applying to them to do so, or giving them notice of its defects. If it then proved defective, he was at liberty to get it repaired elsewhere, or not at all, as he pleased. He was not bound to repair it, or supply its place with other, in order to maintain his action. His right of action for damages in no wise depended upon his subsequent conduct, or that of the defendants, but accrued to him from a breach of the contract by the delivery of machinery, the defects or unsuitableness of which had not been discovered and remedied in accordance with the stipulation.

In this connection, it may also be well to notice two other principles of law sought to be applied to this case: the one, that in actions for injuries arising from the negligence and carelessness of another, the party seeking redress must be himself free from fault, and must not, by his own want of care, have contributed directly to the injury received; and the other, that a party who, by his declarations or conduct, has induced another to act in a particular manner, will not afterwards be permitted to deny the truth of the admission if the consequence would be to work an injury to such person, commonly called an estoppel *in pais*. It appears to us that neither of these principles has any application to it. The former, as a substantive ground of defense, going to defeat the whole action, applies only to suits brought to recover damages occasioned by the negligent conduct of another, and does not apply to actions for a breach of contract like the present. The plaintiff seeks to recover damages by reason of the alleged failure of the defendants to set up and deliver such machinery as the contract called for; and as a mode of establishing such failure, he

offers proof tending to show that when it was put in operation in the manner contemplated by the parties, it did not answer the purposes for which it was intended. This was a means of proof—a knowledge of facts derived from actual experiments—and under the circumstances, perhaps the best which the nature of the case admitted of. As experimental knowledge, it was liable to be fully and fairly scrutinized and tested on the part of the defendants. They had the right to know and to show whether or not the trial to which the machinery was put was fair and proper. The conclusiveness of the experiments, and the weight to be given to the evidence, depended upon this. Therefore the defendants were entitled to prove, if they could, that it was the weakness of the boat or the negligence or want of skill of the plaintiff or his agents, and not their defective and unskillful workmanship, which caused the unsuccessful operation of the machinery. They were entitled to do this, not because such weakness, negligence, or want of skill, if shown, would have operated to bar the whole action, notwithstanding it might still appear that the engines were not in all respects suitable or such as the defendants agreed to furnish, but because it was a legitimate method of meeting, explaining, or rebutting the plaintiff's evidence, and exhibiting before the court and jury the real facts of the case.

The plaintiff was not bound to the defendants to use any degree of care or skill in the use of his boat or machinery, or in the management of his business. They were matters which did not concern them and about which he could suit himself. His conduct in these respects only became the proper subject of investigation on their part, when he undertook to make it the means of showing that they had violated their contract, and then they might lawfully scrutinize it for the sake of arriving at the truth. Suppose that, being possessed of, he had resorted to other means of proof, by which he had indubitably shown that they had broken their contract, and that in consequence thereof he had suffered damage in the sum of one thousand dollars, could they have shown as a matter of defense that his boat was weak and unfit to be navigated by steam, and that if the machinery had been such as he bargained for, it would therefore have been useless to him? Or that he had never put it to the uses for which it was intended? Or that he had used it in such a careless and improper manner that it had thereby become wholly worthless? We think not. We never before heard of such a defense to such an action. Sup

pose the purchaser of a horse, paying the full price of a good animal, with warranty of soundness, should, upon discovering that the horse was unsound and not worth one fourth the price paid, permit him through negligence to die upon his hands, could the seller, in an action against him to recover damages for a breach of the warranty, set up as a defense the purchaser's negligence and the subsequent death of the horse? Clearly he could not. It is needless to pursue this matter further; we think our views must be already understood.

The doctrine of estoppel *in pais* seems equally remote. If it can be applied to any of the acts of the defendants here, by which they were guilty of a breach of their contract, we do not see why it is not equally applicable to every other case of a violated agreement. Equity and good conscience, no doubt, require that every man should faithfully and honestly perform his promises, but his neglect to do so will not shut him out from a full and fair investigation of the facts upon which his alleged non-performance is founded, or deprive him of the benefit of any legal testimony which he may adduce, showing or tending to show that he has fulfilled. Estoppels are sustained, because it is against conscience to allow the party to assert to the contrary of what he has before said or done; but is it against conscience to give a party, prosecuted for the non-fulfillment of his engagement, a complete hearing in a court of justice? We are not of that opinion. To say that he is estopped in such a case is to assume the whole matter in controversy against him, to forestall the verdict of the jury, and to deny his right to an impartial trial according to the forms of the law. If the defendants refused to make repairs when by the contract they were obliged to, it is the object of this action to compensate the plaintiff in damages for the injuries which he sustained by such refusal, but they are not thereby precluded from showing that no repairs were needed, or that those procured were excessive or unnecessary. If, in setting up the machinery in the boat, a part of her timbers were removed by the defendants, by which she was rendered materially weaker, that too was a damage to be recompensed by this action, but it did not debar the defendants from showing that the vessel was otherwise weak and insufficient, and that by that means the machinery was prevented from working well. Whether it was the originally weak and defective construction of the boat, or the weakness occasioned by the acts of the defendants; or whether it was partly the one and partly the other, if either,

which caused the failure of the machinery—were matters for the consideration of the jury, who would determine and assess the damages according to the facts found.

It is contended by the respondent's counsel that the agreement of the defendants to furnish "machinery adapted to and suitable for the boat, and that would drive her from twelve to fifteen miles per hour," was an undertaking on their part to provide machinery that would propel her, "as she was," at that speed. In other words, it is said that by this language they warranted her strength and capacity to endure the weight, shocks, and friction of her machinery when in motion, and the force and action of winds and waves. It is difficult to frame an argument against a proposition so unreasonable and so unjust. The language does not warrant nor did the parties contemplate it. The contract was to furnish engines and appurtenances adequate in weight, workmanship, and power to run a boat of her size and dimensions at the proposed speed, it being understood that she was sufficiently strong for that purpose, of which the owner, as of course, took the risk. Few mechanics, we apprehend, could be found who would be willing to undertake the manufacture of machinery "suitable" for boats, if thereby it was understood that they were to be held responsible for the sufficiency of such boats after their machinery was put in.

It appearing from the testimony that the improvements made by the plaintiff were made after the expiration of the time within which the defendants stipulated for the privilege of making them, and consequently when they were under no legal obligation to do so, the rule of damages should have been the difference in value between the machinery furnished (provided the jury found it to have been defective) and that called for by the contract, adding thereto an allowance to the plaintiff of any expenses he had actually incurred in his business, as a consequence of the failure of the defendants to perform their contracts. This last would include the expenses incurred for the board and wages of the captain, engineer, and seamen, from the first of August, 1855, when the machinery was to have been delivered, to the time when it was in fact delivered, and the like expenses during the time actually lost by breakages whilst the plaintiff was testing the sufficiency of the machinery, and also during such reasonable time after the boat was laid up as, under the circumstances, was required to supply her with new and suitable engines. To these also may be added interest.

We were at first in doubt whether the plaintiff's claim for board and wages of seamen should not be confined to such time as was lost after the machinery was delivered, and up to and including a reasonable time for supplying other, on the ground of his right, upon the failure of the defendants to furnish it on the first of August, to consider the contract at an end, and to proceed to supply himself elsewhere; and because his waiver of performance as to time might be considered an abandonment of any claim for damages on that account. But on further consideration, we are satisfied this would be wrong. A waiver in such cases is made for the benefit of the party in default, and as against him should be construed strictly, and liberally in favor of the party making it. It is supposed to be granted at the request of the party indulged, and should be confined to the precise right waived (which in this case was the right to refuse the machinery after the day), and should not be extended to collateral matters. In this case, there can be little doubt that the plaintiff was deterred from making exertions to procure other machinery by the conduct and assurances of the defendant Verbeck that that contracted for would be speedily completed.

It is almost needless for us to say further that the authorities cited by the respondent's counsel, *Clifford v. Richardson*, 18 Vt. 620, and *Blanchard v. Ely*, 21 Wend. 342 [34 Am. Dec. 250], do not establish, as a measure of damages in cases like this, the sum expended by the purchaser in making repairs, or furnishing other machinery, unless it be so expressly agreed. In the absence of such special agreement, the parties do not contemplate it. In those cases where the defects, which were unimportant, extending only to a single article or small portion of the machinery, and not to the whole subject of the contract, had been supplied by the purchasers on fair terms, evidence of what they had expended was admitted as a proper means of estimating the sum to be deducted, or the true amount of damages as measured by the ordinary rule.

It follows from the views that we have taken, that the judgment must be reversed, and a new trial awarded.

IN CASE OF EXPRESS WARRANTY, and a breach of it, and false representations of property sold, the purchaser, when he is sued for the balance of the purchase price of the property sold, may recoup in damages and set them off against the purchase price: *Red Wing Mfg. Co. v. Moe*, 62 Wis. 243, citing the principal case.

THE TRUE RULE IS, IN CASE OF SALE OF CHATTELS WITH WARRANTY, expressed or implied, in the absence of fraud on the part of the vendor, if the chattel does not answer the terms of the warranty, the purchaser may return, or tender them to the vendor within a reasonable time, and thereby defeat his right to recover any part of the purchase price; or he may keep the property, and when sued by the vendor for the purchase price, may set up the breach of the warranty in recoupment of plaintiff's damages; but in such action the vendor may recover the value of the chattel, notwithstanding the breach of warranty, or its unfitness for the purposes intended: *Warder v. Fisher*, 48 Id. 342, 343; *Locke v. Williamson*, 40 Id. 381; *Bonnell v. Jacobs*, 36 Id. 63; *Keichum v. Wells*, 19 Id. 32; *Woodle v. Whitney*, 23 Id. 56; *Boothby v. Scales*, 27 Id. 636, all citing the principal case; *Brantley v. Thomas*, 73 Am. Dec. 264, and note 268.

AS MANY BREACHES OF CONTRACT as there are may be alleged in the same count of the complaint, and at the trial plaintiff may prove any or all of the breaches: *Nichol v. Alexander*, 28 Wis. 126, citing the principal case.

AMENDMENT SHOULD BE ALLOWED, without terms being imposed, where the evidence varies in an immaterial matter from the allegations of the pleading. The variance is immaterial in all cases where the opposite party has not been misled by the allegations: *Engel v. Hardt*, 56 Wis. 460; *Delaplaine v. Turnley*, 44 Id. 43; *Ballston Spa Bank v. Marine Bank*, 16 Id. 114, 115; *Hitchcock v. Merrick*, 15 Id. 527, all citing the principal case.

MANY CAUSES OF ACTION MAY BE JOINED in one suit: *Mooney v. Kennet*, 61 Am. Dec. 576, and note 580.

REASONABLE NOTION OF TIME AND PLACE OF TAKING DEPOSITION must be given: *Attwood v. Fricot*, 76 Am. Dec. 567; *Woodard v. Spiller*, 25 Id. 139.

WHAT IS REASONABLE NOTICE: *Hunt v. Crane*, 69 Am. Dec. 381.

JURAT OF DEPOSITION MUST SHOW THAT OATH was administered by officer signing it: *Powers v. Shepherd*, 53 Am. Dec. 168, and note 169.

DEPOSITIONS CONTAINING ILLEGAL EVIDENCE should not be entirely excluded. The illegal evidence should be excluded, and the legal evidence should stand: *Hamilton v. Scull's Adm'r*, 69 Am. Dec. 460; *Miles v. Stevens*, 45 Id. 621.

DEPOSITIONS NOT RETURNED AS REQUIRED BY STATUTE must be excluded from evidence: *Avery v. Avery*, 62 Am. Dec. 517.

DEPOSITION IS INCOMPETENT EVIDENCE when the words "before me" in the caption are omitted, preceding the name of the officer taking the deposition: *Powers v. Shepherd*, 53 Am. Dec. 168.

SECONDARY EVIDENCE of contents of a writing cannot be admitted in evidence, until the original is shown to be lost or destroyed, etc.: *Williams v. Brickell*, 75 Am. Dec. 88; *People v. Lambert*, 72 Id. 49. When secondary evidence is admissible: *Allen v. State*, 68 Id. 457, and note 459.

THERE IS NO WARRANTY by seller against latent defects in the article sold, where buyer has had an opportunity to examine it: *Bagan v. Call*, 78 Am. Dec. 653, and note 655.

PLATTO v. CADY.

[12 WISCONSIN, 461.]

IF LEASED LOT IS USED AS HOMESTEAD by a married man, he being the owner of the building in which he resides with his family, he has power to assign the lease, and sell the house, and give a bill of sale therefor without his wife joining in the transaction. Such a transaction does not come within the disability imposed on the husband by the homestead laws of Wisconsin.

THE facts are stated in the opinion.

George W. Lakin, for the appellant.

J. V. V. Platto, respondent in person.

By Court, PAINE, J. One Herring was the owner of a dwelling-house upon a lot of which he had a lease. He was a married man, and occupied this dwelling-house as his homestead. He sold the house to Platto, executing a bill of sale, and also assigned to him the lease, the wife not signing either the bill of sale or the assignment. He afterwards sold both the house and lease to Cady, the wife joining in the conveyances. This is a contest between Cady and Platto for the property, and it depends entirely on the question whether the transfer to Platto was within the disability against alienating the homestead without the signature of the wife, imposed by the law now found in section 24, chapter 184, revised statutes of 1858. It was argued here by counsel on both sides, as though this turned upon the question whether the property could be considered as a homestead, and as exempt under the act. If it turned upon that, it would clearly be within the disability, for section 28, which was not referred to by either counsel, expressly provides that any person owning and occupying a house on land of which he is rightfully in possession, by lease or otherwise, shall be entitled to the exemption. Whatever question might be raised as to whether such a property could be held exempt as a homestead, if this section had not been enacted, there is certainly no room for question on that point in view of its provisions.

But we do not think that the question presented on this appeal depends upon the other. Although it is conceded that this property might have been held as exempt from forced sale, by virtue of section 28, it does not follow that it was within the disability imposed upon the husband by section 24, as to alienation without the signature of the wife. It may be observed at the outset, that the principal object of the exemp-

tion laws is to protect the debtor and his family from the seizure and forced sale of his property by his creditors. This is all that is included in the constitutional requirement on the subject. But it was undoubtedly competent for the legislature, in pursuance of what it deemed to be a sound public policy, to further protect the family of the debtor, by imposing upon him a disability even voluntarily to alienate the land owned by him and occupied as a homestead. But they need not necessarily impose it as to all homesteads. On the contrary, they might deem it wise to establish such a disability only in respect to homesteads, where the interest of the occupier in the land was of a permanent character, without including all which were exempted from forced sale. And on a careful examination of the provisions of the statute, it seems to us that this is precisely what they have done.

Section 23 exempts a homestead consisting of a certain quantity of land "owned and occupied by any resident," etc. Section 24 provides that the mortgage or other alienation of such land by the owner thereof, if a married man, shall not be valid without the signature of the wife.

Now, we do not undertake to say that these provisions intend only the absolute owners of the fee. On the contrary, we think they may well be held to include owners of a less interest. But we do not think they extend to the owners of such an interest as is mentioned in section 28. For the words of the statute seem expressly to exclude that idea. Its language is, that any person owning and occupying a dwelling-house, "on land not his own," may be entitled to hold the house exempt. Thus it will be seen that the disability imposed by section 24 relates to the alienation of land, by the owner thereof, and the exemption privilege conferred by section 28 relates to a house owned by a man upon land not his own. The legislature evidently supposed that the case provided for in section 28 was not included in the previous sections relating to a homestead. They then enact it, giving the privilege of the exemption, but do not extend to the owner of such a house on land not his own the disability which had been imposed upon the owners of lands used as homesteads in the previous section. It seems clear that there is no language employed indicating any intention to extend the disability to cases provided for in section 28. And it being a familiar rule that disabling statutes are not to be extended, by construction, to cases not clearly within their provisions, we should not feel at

liberty to extend it to such a case, even though we might think the same reason existed for it in the one case as in the other.

But there may be good reason for a distinction between the two. Section 28 evidently relates to cases where the only interest of the party in the land is merely of a possessory character, and where no permanent ownership is contemplated. The house is treated, in that section, as the principal object of the exemption. And while the legislature might desire to protect such a temporary home from a forced sale, they might, at the same time, think it not necessary or wise to extend to it the same disability against alienation which they had established in respect to those where the interest in the land was of a more permanent character.

For these reasons, the judgment of the court below must be affirmed, with costs.

HOMESTEAD IN WISCONSIN IS LAND not exceeding prescribed quantity upon which is the dwelling-house, etc., of the owner and his family: *Pelpe v. Rooney*, 76 Am. Dec. 244, and note 251, where the subject of when premises constitute a homestead is elaborately discussed and prior cases in this series collected. The homestead right does not attach to building independent of the land: *Smith v. Smith*, 73 Id. 536.

HOMESTEAD, SALE OF.—The principal case is cited to this point in *McCabe v. Marzuchelli*, 13 Wis. 480, and *Godfrey v. Thornton*, 46 Id. 682; and to the point that where no selection has been made it will be presumed to have been made of the land upon which the family residence is situated, in *Kent v. Lasley*, 48 Id. 263, in which it is said that the principle stated is there recognized.

OGDEN v. STATE.

[12 WISCONSIN, 582.]

INDICTMENT FOR CRIME OF ACCESSARY BEFORE FACT to the commission of a felony cannot be sustained unless the guilt of the principal felon be established as well as the guilt of the defendant as accessary. The confession of the principal felon as to his guilt is not admissible as evidence against the accessary, it being as to him hearsay evidence.

IN error. The facts are stated in the opinion

Sessions and Reed, and George B. Smith, for the plaintiff in error.

J. H. Howe, attorney-general, for the state.

By Court, DIXON, C. J. The only point raised by the exceptions appears to the court clearly in favor of the prisoner. He

was indicted under the provisions of section 2 of chapter 172 of the revised statutes, as for a substantive felony, being charged as an accessory before the fact to the crime of arson, said to have been committed by burning the barn of one John Bourcies, in the county of Portage. This and the succeeding section are borrowed from section 9, chapter 64, of the English statutes 7 Geo. IV. It enacts that every person who shall counsel, hire, or otherwise procure any offense to be committed which shall be a felony may be indicted and convicted as an accessory before the fact, either with the principal felon, or after the conviction of the principal felon, or he may be indicted and convicted of a substantive felony, whether the principal felon shall or shall not have been convicted, or shall or shall not be amenable to justice, and in the last-mentioned case may be punished in the same manner as if convicted of being an accessory before the fact. Sidney Wright, who, it is alleged in the indictment, was the principal felon, had made his escape, and it does not appear that any indictment was ever preferred against him.

The felony is charged to have been committed by Wright on the thirty-first day of August, 1859. The only evidence offered on the trial of the guilt of Wright was his admissions made to Darius Dodd and Stiles Wheeler, two of the witnesses produced and sworn on the part of the state. Dodd testified that he resided in the county of Portage, and knew Wright; that after the fire, and in the month of March, 1860, he had a conversation with him in relation to it, at the city of Dubuque, in the state of Iowa, and that Wright said he burned the barn by lighting matches and putting them in the straw in the nighttime. Wheeler testified that he saw Wright the next morning after the barn was burned, when he said "he had better get out of this, that he had burned the barn." This was all the testimony offered concerning Wright's guilt or connection with the affair. To its reception, proper objections and exceptions were taken by the prisoner.

It is very evident that, upon this testimony, the conviction cannot be sustained. In order to establish the guilt of Ogden, it was first incumbent on the prosecutor to prove the guilt of Wright as alleged in the indictment. This done, he must then prove that Ogden previously procured, hired, advised, or commanded Wright to commit the felony. Both these facts must be established by competent evidence. Now, however, the confessions of Wright, as to the first, might have been used against

him, had he been indicted and put upon his trial; it is very evident that as against Ogden, they were wholly inadmissible. As to him, they were mere hearsay, and open to all the objections which exist to that kind of testimony. For however clearly it may have appeared that Ogden counseled and advised Wright to commit the offense, yet if Wright never did so in point of fact, and the barn was set on fire by some one else, or by other means, then Ogden was innocent of the crime with the commission of which he stood charged.

If such admissions were to be received, Wright, after the advice was given, but without having acted upon it, and being innocent, and believing that his personal safety would not thereby be endangered, might make them from feelings of ill-will and hatred to Ogden, for the sole purpose of deceiving and misleading others, and betraying him into the conviction of an offense of which he knew him to be innocent. They were made privately, and without the sanction of an oath; the jury had not the advantage of observing his deportment, or the manner in which his statements were made; no opportunity was afforded to ascertain whether he was friendly or hostile to the accused; he was subjected to no cross-examination, and his motives, means of knowledge, and situation could not be inquired into and exposed. For authorities on this question, see 1 Russell on Crimes, 8th Am. ed., 43, and notes, and cases there cited.

The judgment of the circuit court is reversed, and a *verdict de novo* awarded.

ACCESSARY MUST BE PRESENT either actually or constructively aiding or abetting in the commission of the felony committed by the principal felon: *State v. Snell*, 46 Wis. 529.

AIDING AND ABETTING CRIME, WHAT IS: See *State v. Hildreth*, 51 Am. Dec. 369, and note 373, where the subject of accessaries to crime is fully discussed. See also note to *People v. Adams*, 45 Id. 473, 474.

RECORD OF PRINCIPAL'S CONVICTION is *prima facie* evidence of his guilt upon the trial of the accessory: *Commonwealth v. Knapp*, 20 Am. Dec. 534.

ACCESSARY BEFORE FACT residing in another state than that in which the crime is committed, at the time it was committed, is amenable for his crime to the laws of the state of his residence, while the principal felon is answerable to the laws of the state where the crime was committed: *State v. Chapin*, 65 Am. Dec. 452; *People v. Adams*, 45 Id. 468.

BORNGESSER v. HARRISON.

[12 WISCONSIN, 544.]

JUDGMENT UPON RUNNING ACCOUNT IS BAR to another action upon the same account, although the items upon which the second suit is based were omitted from the claim in the first action, by plaintiff, said items being due when the first action was commenced.

IF SPECIFIC INSTRUCTIONS TO JURY ARE DESIRED by a party to the action, it is the duty of that party to request the court to give such instruction.

PRESUMPTION IS, THAT ALL TRANSACTIONS BETWEEN SAME PARTIES are a part of the same account, but two accounts may exist between the same parties and the presumption may be rebutted by proving this fact. In such a case, a judgment on one account would not bar a judgment on the other account.

THE facts are stated in the opinion.

Von Deutsch and Winkler, for the appellant.

Cary and Pratt, for the respondent.

By Court, PAINE, J. This was an action on account for meat delivered on the defendant's vessel. The defense was, that an action had previously been brought by the plaintiff against the defendant upon the same account of which these items formed a part, and a judgment recovered, which, it was claimed, barred this suit, though these items were not claimed in the other suit. The court below charged the jury that if they found such to have been the fact, this suit was barred. We think the instruction was correct. The law was so held in *Guernsey v. Carver*, 8 Wend. 492 [24 Am. Dec. 60], and we think has not been departed from by the courts of New York since. The opposite doctrine was held in Massachusetts, in *Badger v. Titcomb*, 15 Pick. 415 [26 Am. Dec. 611], where it is said that there is no principle of law, nor any other decided case, by which the decision in *Guernsey v. Carver*, *supra*, could be sustained. But the question is again reviewed by Justice Cowen, in *Bendernagle v. Cocks*, 19 Wend. 207 [32 Am Dec. 448], who showed that the decision was sustained both by principle and authority. We do not deem it necessary to attempt to add anything to what is said in these cases. But it may be remarked that if we understand properly the nature of an account, there is something even in the opinion in the case in Massachusetts which would sustain that decision. The court say that a "running account" will not constitute an entire demand, "unless there is some agreement to that effect, or some usage or course of dealing from which such an agreement or understanding may be inferred." Now, although that

court evidently did not so regard it, it seems to us that the very fact that there is a "running account" shows the very "course of dealing" from which the "understanding" alluded to ought to be inferred. The very fact that there is such an account imports that the parties have not been accustomed to treat every separate matter of charge as a distinct debt, but on the contrary, to enter it in the account to become a part thereof and going to make up the debt, which consists of the entire balance due. And such, we think, is the general understanding of men with respect to accounts. For this reason, we think the case of *Guernsey v. Carver*, *supra*, is correct upon principle.

But it was claimed by the counsel for the appellant that the case of *Secor v. Sturgis*, 16 N. Y. 548, has overruled this doctrine and established the opposite. But we do not think it should have that effect. In that case, the same firm carried on two distinct branches of business, keeping different clerks and separate account-books. An account accrued against the defendant in each branch, and it was held that the two did not constitute an entire demand, so that a recovery upon one would bar the other. This was undoubtedly correct. There was nothing in such a course of dealing, or in such a mode of keeping the accounts, which would indicate any understanding of the parties that the two accounts should constitute one debt. On the contrary, everything indicated the opposite intention. And they were, to all intents and purposes, two accounts, and were so spoken of and treated in that case, and we can see no impossibility in there being two accounts in favor of one party against another. Suppose a lawyer is also the owner of a store. He performs legal services for a client, charging them in an account. The same client has an account at the store, which is kept separate. The two might be joined in one suit, and so might be within the policy of the law to prevent a multiplicity of suits. But nobody would say they were one account, or that such a mode of doing business indicated any intention or understanding that they were to be blended into one claim. The question in that case was entirely different, therefore, from the one whether each of those accounts could have been divided into as many suits as there were separate and distinct items, and there was nothing in it which called for the comments which the judge delivering the opinion made upon some of the cases already referred to. The rule as stated by him is, that different actions may be brought on the differ-

ent items of an account which did not arise out of a single transaction, and are not connected together by a contract, and by this he evidently meant some contract further than that to be implied from the very nature of the account itself. Now, if that is so, I have no doubt there are many accounts that might be split up into hundreds of different suits, and thus the rule be made the cause of intolerable oppression. Take the case of a man having a large number of workmen, with an account at a store, but without any special contract beyond that. He draws perhaps several hundred orders in favor of his workmen, which are all charged up in one account. These are separate transactions. Every order, taken alone, would be evidence of a distinct debt. There is no contract that the account shall all be considered one debt. The merchant might therefore bring as many hundred suits as he held orders. And yet everybody knows that the very fact that the parties make these the subject-matter of a single account implies a different understanding.

While I think this case was correctly decided upon its facts, I must therefore be permitted still to think that the previous cases were also correctly decided. And notwithstanding all he says upon the subject, I think the judge in that case admits, after all, the whole foundation upon which the former cases rest. On page 558, he says: "And usually, in the case of a running account, it may be fairly implied that it is in pursuance of an agreement that an account may be opened and continued, either for a definite period, or at the pleasure of one or both of the parties." It was suggested here that there were in fact two accounts, and there was some evidence tending to show that the plaintiff intended at first to keep this claim distinct from his general account against the defendant. We think he might have kept it out of that account if he had seen fit. There were reasons, perhaps, why he should. It constituted a claim against the vessel, for which he would have had a lien. For this reason, it might very properly have been kept separate from an account composed of items for which he would have had no lien. But he suffered the time within which he might have pursued his lien to expire. And there was evidence tending to show that he afterwards blended this claim in his general account against the defendant, making one account of it. We think the instruction given by the court below fairly implies that the jury must find that this was part of the same account on which the prior suit was brought, before it would be

barred. If the plaintiff claimed that there were, in fact, two accounts, and that this never was treated as a part of the other, the judge might have submitted that question more specifically to the jury, if he had been asked to do so. But he was not. On the contrary, the point in contest on the trial seems to have been whether, if this claim was a part of the same account on which the other suit was brought, an action could still be sustained for this by reason of its being a distinct matter from the other items. Upon that point, we think the judge charged correctly, and that if the plaintiff desired to have the point more definitely submitted, as to whether this was a part of the same account, he should have asked an instruction to that effect.

The judgment is affirmed, with costs.

EFFECT OF JUDGMENT IN ACTION ON ACCOUNT AS BAR TO SUBSEQUENT ACTION FOR ITEMS OMITTED.—The question as to whether, in an action on a running account, where part of the items have been omitted, the judgment will be a bar to another action afterwards brought to recover for the items of the account so omitted, depends on whether the demand for which the action is brought is divisible or entire. The subject of divisible and indivisible demands, and whether an entire demand can be split into several causes of action, is discussed in *Guernsey v. Carver*, 24 Am. Dec. 60, and note 61, 62; and *Badger v. Titcomb*, 26 Id. 611, and note 615, 616.

In *McIntosh v. Lown*, 49 Barb. 550, the court say: "The true question in all such cases is not whether the rule allowing separate actions to be maintained for separate items would lead to a multiplicity of suits or would operate oppressively, but it is whether the former action was for the identical cause or demand as that for which the subsequent one is brought. In the latter case, where the demands in both constitute one entire, inseparable cause of action, the plaintiff is not at liberty to separate them so as to maintain separate actions for different portions of such entire demand." The rule is evidently clear that where the demand is entire the cause of action cannot be split up, but the difficulty is to ascertain what constitutes an entire demand. In *Freeman on Judgments*, 3d ed., sec. 239, it is said that "the amounts due upon a book-account are generally regarded as constituting an indivisible demand," citing *Avery v. Fitch*, 4 Conn. 362; *Lucas v. Le Compte*, 42 Ill. 303; and the note to the *Duchess of Kingston's Case (Doe v. Oliver)*, 2 Smith's Lead. Cas. 671; but that "some courts consider each separate charge as a distinct cause of action not to be affected by proceedings for the recovery of other charges, antecedent or subsequent," citing *Ree v. Sheriff*, 1 Barn. & Adol. 672; *McIntosh v. Lown*, 49 Barb. 550.

In *Avery v. Fitch*, 4 Conn. 362, it is held that a party cannot sever a book-debt, and bring distinct suits upon separate portions of it, and that a judgment for some of the items would be a bar to a subsequent action for other items; but that this does not apply where a party brought one action of book-debt, and subsequently brought another similar action for an account which accrued subsequently to the commencement of the first action, and a recovery in the second action would be no bar to the first action. To the same effect,

see *Lane v. Cook*, 4 Day, 255. In *Lucas v. Le Compte*, 42 Ill. 303, it is held that a book-account is one entire demand, and that if the plaintiff should split the cause of action, and bring two suits for the different portions of it, a recovery in one suit would bar the other. In *Pittman v. Chrisman*, 59 Miss. 126, the court say: "In suits brought on book-accounts, where the known custom of the country, or the agreement of the parties, or their general course of dealing warrants the belief that it was intended that the several items should constitute one indebtedness, whether due at the same or different times, one suit alone is admissible. But where there are independent transactions between the parties, having no connection with each other, though all be done at the time suit is brought, there is no obligation on the plaintiff to embrace them all in one suit, nor can the defendant complain that he has not been sued for enough, or demand that the plaintiff shall embrace in one suit matters which have no connection with each other." In *Secor v. Sturgis*, 16 N. Y. 548, it is said that a demand usually will be considered indivisible, in the case of a running account, for the reason that it may be fairly implied that it is in pursuance of an agreement that an account may be opened and continued either for a definite period or at the pleasure of the parties. This case, and the case of *Badger v. Ticecomb*, 26 Am. Dec. 611, which seems to be in a measure opposed to the doctrine that running accounts are entire demands, are quoted extensively in the opinion in the principal case, and their effect stated and distinguished from that of rulings in other cases. In *Magruder v. Randolph*, 77 N. C. 79, it is held that where the dealing between a debtor and creditor was continuous, and nothing appeared on the face of the transactions or in the account rendered to indicate that either party intended that each item should constitute a separate transaction and cause of action, the court will presume that the demand is entire and indivisible, and will not permit it to be split up for the purpose of several actions. And in *Memmer v. Carey*, 30 Minn. 458, the court say: "It is a general rule (in the absence of special facts to create an exception), that an indebtedness of his customer to a retail dealer upon a running account furnishes one entire cause of action, and if such cause of action is split, and a recovery had upon part of it, the judgment is a bar to any further recovery thereupon," citing approvingly *Guernsey v. Carver*, 24 Am. Dec. 60; and *Secor v. Sturgis*, 16 N. Y. 548.

The rule that several items of an account shall be considered as entire and indivisible applies only to regular running accounts. Thus a number of sales made at various times by one party to another is not necessarily an indivisible demand. "Several sales made at different times may be, by agreement of the parties, or by inference from circumstances, so blended or connected as to constitute but one entire demand or cause of action; and from the circumstances attending the making of several sales, an agreement or understanding may be inferred that the whole was intended to comprise, in a running account, one demand only. In the absence of such agreement or circumstances, however, distinct contracts of sale constitute distinct causes of action:" *American Sewing Machine Co. v. Thornton*, 28 Minn. 420; *Secor v. Sturgis*, 16 N. Y. 541. Of somewhat the same nature as the case just quoted was the case of *Rea v. Sheriff*, 1 Barn. & Adol. 672, a case sometimes cited in opposition to the doctrine that a running account constitutes an entire demand. The facts of this case show that two actions were brought, each being for a demand for carriage of goods. Each was a separate transaction, and the two took place a month apart. The court did not decide that a running account would not constitute an entire and indivisible demand; but that these, from

the evidence, appeared to be separate transactions, and that therefore separate actions might be maintained for the sums due in each case.

JUDGMENT IS BAR TO ANOTHER ACTION between the same parties as to all things which should have been litigated in the first action: *Kachler v. Dobberpuhl*, 60 Wis. 262; and *Board of Supervisors v. Mineral Point R. R. Co.*, 24 Id. 124, 125, citing the principal case and other authorities. Recovery of part of entire demand merges the whole claim, and bars any further recovery thereon: *Baker v. Baker*, 75 Am. Dec. 243, and note 250.

ENTIRE DEMAND CANNOT BE SPLIT UP so as to authorize more than one suit thereon: *Bendernagle v. Cocks*, 32 Am. Dec. 448, and note 454; *Nightingale v. Scannell*, 65 Id. 525, and note 526.

WHEN NO PARTICULAR INSTRUCTIONS ARE ASKED, neglect of court to give instructions which might properly have been given is not error: *Recess v. Delaware etc. R. R.*, 72 Am. Dec. 713; *Moses v. Boston etc. R. R.*, 64 Id. 381, and note 393; *Kaufman v. Griesemer*, 67 Id. 437, and note 442.

STARK v. BROWN.

[12 WISCONSIN, 572.]

EQUITY OF REDEMPTION DESCENDS TO HEIRS OF DECEASED MORTGAGOR, and is not barred by a sale of the land, under a decree of foreclosure, in an action in which the administrator of such deceased mortgagor is the defendant, and the heirs are not joined.

SALE UNDER DECREE OF FORECLOSURE will operate as an assignment of the mortgage debt, where the mortgagor died prior to the commencement of foreclosure proceedings, and his administrator was made a party thereto, but his heirs were not, and the purchaser at such sale will be treated as a mortgagee in possession.

DEED OF MORTGAGED PREMISES, FROM PURCHASER AT MORTGAGE SALE, where such sale only operated as a transfer of the mortgage debt to the purchaser, will transfer the interest of the purchaser in such debt to the grantee in such deed, so that after the entry of such grantee upon such premises, he will stand in the position of a mortgagee in possession.

EJECTMENT. Defendant admits that he is in possession of the premises claimed, and claims a title thereto. Pliny Drake owned said premises, and is the common source of title of both plaintiff and defendant. Said Drake mortgaged said premises to Isaac H. Alexander, October 14, 1836, to secure a note of four hundred dollars, made, executed, and delivered to the latter by said Drake. Drake died in April, 1838, intestate, being still seised of said premises. In November of that year, one Aldrich was duly appointed and qualified as administrator of said deceased. David Drake, one of the heirs of deceased, received a deed of said premises from all the other heirs, and assigned by deed an undivided one half thereof to J. L. Stark. David Drake and said Stark are plaintiffs here.

Alexander transferred the note and mortgage to William N. Gardner. The latter afterwards died, and L. Ward, M. Gardner, and W. B. Sheldon were duly appointed and qualified as his administrators. These latter persons, as administrators of said Gardner, deceased, commenced an action to foreclose said mortgage, and made Aldrich, the administrator of Drake, deceased, a party thereto, but did not join any of Drake's heirs, or their successors, as parties to the action. A decree of foreclosure was entered in this case, directing a sale of the premises. They were sold, and plaintiffs are the assignee of the purchaser, by regular conveyances. Other facts are stated in the opinion.

Palmer and Stark, for the appellants.

James S. Brown, for the respondent.

By Court, PAINE, J. This was an action of ejectment. It was conceded that the title was originally in Pliny Drake, who died in April, 1838. The plaintiffs claim one as one of his heirs, and both under the other heirs. The defendant claims under a foreclosure proceeding upon a mortgage executed by Pliny Drake, which was instituted after his death, and to which his administrator alone was made a party.

The defendant claims: 1. That this proceeding was effectual to transfer the entire title to the purchaser at the foreclosure sale, divested of all right of the heirs; and 2. If not, that it was at least effectual to transfer the interest represented by the mortgage, and that the subsequent deeds through which he claims, must be sold to operate as an assignment of that mortgage interest, so that he stands in the position of a mortgagee in possession after condition broken, and cannot be ousted by ejectment. If either of these propositions can be sustained, it is conceded that the plaintiffs' action must fail.

We agree with the plaintiffs, and as it seems, with the court below, that the first is incorrect. The rights of the heirs—they not being made parties to the suit—could not be divested by the foreclosure proceeding. The argument of the defendant, that it should have that effect, is founded upon what he claims to be an entire change in the policy of the law, from that which existed in England, under which the rule that heirs were necessary parties to a foreclosure was established. That change is in making the land subject to the debts of the deceased, through a sale by his administrator, and in giving

him, as our law now does, and as he claims it then did, the possession of the real estate during the administration. But we cannot concede to these changes the effect contended for. Nor do we think, as argued by counsel, that these statutes make the interest of the heirs in the real estate, prior to an order for its distribution, precisely the same as their interest in the personal estate, leaving the administrator to represent both for all purposes. It is well known that the legal title to the personalty is vested in the administrator. But it could hardly be claimed that these statutes vest in him the legal title to the real estate. That must still be held to descend to the heirs, and vest in them on the death of the ancestor, subject to be divested by a sale for the payment of debts. They therefore have an immediate interest in the premises, which cannot be divested by a foreclosure to which they are not parties.

Counsel relied upon the case of *Grignon v. Astor*, 2 How. 319, as establishing the proposition that "in a proceeding to sell the real estate of an indebted intestate, there are no adversary parties, the proceeding is *in rem*, and the administrator represents the land," etc. It is true that the court in that case asserted that doctrine, and held that the provision in the statute requiring notice to be given to the parties interested, before the court should pass upon the application, did not affect its jurisdiction. Whether that is the law or not in this state, with respect to sales by administrators, we shall not now attempt to decide. It is certainly not in conformity with a long list of adjudications that might be cited, among which are the following: *Bloom v. Burdick*, 1 Hill (N. Y.), 130 [37 Am. Dec. 299]; *Sherry v. Denn*, 8 Blackf. 542; *Gwin v. McCarroll*, 1 Smed. & M. 351; *Adams v. Jeffries*, 12 Ohio, 253 [40 Am. Dec. 477]; *Messinger v. Kintner*, 4 Binn. 97; *Schneider v. McFarland*, 2 N. Y. 459; *Planters' Bank v. Johnson*, 7 Smed. & M. 449.

But we do not feel called upon to discuss the correctness of that decision, for the reason that it must be held to relate only to a proceeding by an administrator, under the statute, to sell the real estate for the payment of debts. When the court said that the administrator represented the land, they meant in that proceeding. And it would be entirely unwarrantable to say that they intended to assert that he represented it for all purposes, so that a foreclosure suit to which he alone was a party would divest the rights of the heirs. There is a great difference between the two cases. In the one, the statute

expressly authorizes and requires him to proceed for the purpose of making a sale. The design is to pay the debts of the estate, which is one of his most important duties. In the other case, it is conceded that there is no statute expressly requiring or authorizing him to be made a party to a foreclosure, and his character as a representative of the land for that purpose is sought to be derived entirely from the rights which the law gives him as to the possession, and as to obtaining a license to sell on a certain contingency. Even if the case in 2 Howard should be held to establish the doctrine that, on a direct statutory proceeding by him to effect a sale for the payment of debts, he is to be considered as the representative of the land for all the parties interested, so that the judgment would not be void, though such other parties had no notice, we do not by any means think it can have that effect with respect to foreclosure suits, or any other by which the title to property is sought to be affected.

But we think the defendant's second position is well taken. And that is, that although the foreclosure sale had no effect to divest the interests of the heirs, the purchaser must be held to have acquired the mortgage interest. The counsel for the appellants have attacked the correctness of this doctrine. But it has already been passed upon by this court in a manner with which we are entirely satisfied. The case of *Watson v. Spence*, 20 Wend. 260, sustains the view of the plaintiffs. That of *Frische v. Kramer*, 16 Ohio, 125 [47 Am. Dec. 368], sustains the opposite view. And in *Tallman v. Ely*, 6 Wis. 258, this court distinctly repudiates the doctrine of the former case, and approves that of the latter. The plaintiffs contend that this case is distinguishable from *Tallman v. Ely*, *supra*, by the fact that there some of the parties in interest were served with process, and made parties to the suit. But that was not so in *Frische v. Kramer*, *supra*. The mortgagor was a party there, it is true, but he was made so after he had sold the property; and he had no more interest in it than had the administrator in this case, and possibly not as much. But we do not think the decision should turn upon the point whether somebody actually interested is made a party. On the contrary, the conclusion would seem to rest rather upon certain equitable considerations between the mortgagee and the purchaser. The former had full power at any time to assign all his interest to the latter. If he sees fit to invoke the agency of the law, not only to accomplish that assignment, but to divest all adverse

rights and transfer then also to the purchaser, if by any reason he fails to accomplish the latter object, should that also defeat the former? It seems to us not. Even though technically a correct argument can be made against the validity of the judgment as such, it still seems to us that the proceeding ought to be allowed to operate as a mode by which the mortgagee voluntarily transferred his interest, at least, to the purchaser. Where the mortgagee has assented to the sale in that manner, and taken the purchaser's money, this conclusion would seem to rest safely on the doctrine of equitable estoppel, whatever irregularities there might be in point of form. But here the property was bid in by one of the administrators of the assignee of the mortgage, who was one of the complainants in the suit. As such, he would undoubtedly be held a trustee for the benefit of those interested in the estate, in a controversy between him and them. But there is no such controversy here, and we do not see that this fact has any material bearing upon the question.

It was subsequently discovered that the equitable title to the mortgage was in the brother of the assignee, and he, ratifying the foreclosure sale, commenced an equitable suit against the purchaser and all the other parties interested, to obtain a transfer of the interest acquired at that sale to himself. Such a transfer was adjudged, and deeds executed accordingly, and through them the title comes in a regular chain to the defendant. It is now urged by the plaintiffs that, even conceding that the foreclosure sale operated as an assignment of the mortgage interest, still these deeds cannot be held to have operated in the same way. This conclusion is derived from the fact that the mortgage is a mere incident of the debt, and that a deed of the land neither purports to nor does assign the debt, and therefore the mortgage interest in the land cannot be held to pass. There are some cases apparently sustaining this position, as *Jackson v. Bronson*, 19 Johns. 325. It is a very short case, and the circumstances are not fully stated. The court said: "The assignment of the interest of the mortgagee in the land, without an assignment of the debt, is considered in law as a nullity." But the court do not discuss the question whether, under any circumstances, such an assignment could be held to transfer the debt, and thus become operative as an assignment of the entire mortgage interest. The same question is discussed in *Wilson v. Troup*, 2 Cow. 195 [14 Am. Dec. 458]. The mortgagee had there sold parts of the mortgaged

premises by warranty deed, and the question was, whether he afterwards had the right to foreclose. Several opinions were delivered. Woodworth, J., uses general language, in terms applicable to a case where the mortgagee had conveyed the whole land, and holds that such a conveyance would not operate as an assignment of the mortgage. Sutherland, J., on the other hand, makes the case turn on the point that he had only sold a part of the property; and Savage, C. J., concurs upon the same ground.

Other cases cited by the plaintiffs hold that a mere deed of the land by the mortgagee does not operate as an assignment of the mortgage and debt, yet clearly imply that under certain equitable circumstances it might have that effect. Such is the case of *Bell v. Morse*, 6 N. H. 205, where the court say that they "have no doubt that, under certain circumstances, a conveyance of the land by the mortgagee will pass the debt secured by the mortgage." And they further imply that it would be sufficient if it appeared that the mortgagee, at the time, had a right to transfer the debt. The same idea is suggested in subsequent cases in that state, though not decided: *Ellison v. Daniels*, 11 Id. 283. In *Weeks v. Eaton*, 15 Id. 145, while holding that the facts of that case brought it within the rule as previously decided, the court intimate that if the amount of the claim had been liquidated, it "might have been assigned by a deed of the land, with warranty." And again, in *Furbush v. Goodwin*, 25 Id. 450, it is said that "the doctrine of the cases is, that a mere quitclaim deed, purporting to be a conveyance of the land mortgaged, will not pass the debt," etc., implying still that a warranty deed might, under certain circumstances, have that effect.

On the other hand, in the case of *Hunt v. Hunt*, 14 Pick. 374 [25 Am. Dec. 400], there is a well-reasoned opinion deciding that a quitclaim deed by the mortgagee of his interest in the land would operate as an assignment of all his rights as a mortgagee. And the same doctrine is held in *Carll v. Butman*, 7 Me. 102; and in *Crooker v. Jewell*, 31 Id. 306. It is suggested by counsel in their brief, that "these cases depend upon the principle of equity that upholds the security in such case for the protection of the releasee against the intervening title of the first grantee." This suggestion is, doubtless, based upon the facts in *Hunt v. Hunt*, 14 Pick. 374 [25 Am. Dec. 400], where the assignee of the mortgage was the second purchaser also of the equity of redemption. The court kept the mort-

gage interest alive after its assignment to him, so as to protect him against the prior conveyance of the equity of redemption. But the question whether that interest should be kept separate for his benefit, after he obtained it, is entirely distinct from the one whether he had obtained it. The equitable principle alluded to relates entirely to the former question, and has no bearing upon the latter. On the contrary, the conclusion upon that seems to rest upon another equitable principle, which is, to give some effect to the intention of parties in their deeds, if, consistently with the rules of law, they can have any effect.

In addition to these cases, we may say that the case of *Frische v. Kramer*, 16 Ohio, 125 [47 Am. Dec. 368], seems necessarily to show that a deed of the land in such a case should operate as an assignment of the mortgage interest. That case gave such an effect to a deed on a foreclosure sale, though it no more purported to assign the debt or the mortgage than did the subsequent deeds in this case from the purchasers at the foreclosure sale. We have followed that case upon that point, and I am unable to see why the same reasoning should not hold good with respect to a deed directly from the mortgagee. If, by procuring the officers of the law to make a deed in a case where no jurisdiction was obtained over adverse parties, the mortgagee is held to have assigned the mortgage, by the same reasoning the purchaser, supposing himself to have acquired the entire title, should be held to have assigned it by a deed purporting to have conveyed the land: See *Warder v. Tainter*, 4 Watts, 270. We think, therefore, that the court below was right in holding that the defendant had acquired the mortgage interest, and stood in the position of a mortgagee in possession after condition broken, not to be ousted by ejectment.

It is urged that the note should be accounted for or produced. But no exception seems to have been taken on that point at the trial, other than in connection with the admissibility of the deeds. The court was not asked to submit any question as to its payment to the jury. And there was no evidence tending to show payment, and we think no presumption of it arises from lapse of time, under the circumstances of this case, where all the parties have evidently acted on the supposition that the note was merged in the decree.

We think, upon the whole, there was no error, and the judgment must be affirmed, with costs.

FORECLOSURE AND SALE OF MORTGAGED PREMISES, after the mortgagor has parted with the equity of redemption, has the effect to transfer to the purchaser under the foreclosure sale the rights of the mortgagee, as against those not made parties to the action: *Moore v. Cord*, 14 Wis. 216; *McCoy v. Quirk*, 30 Id. 529; and *Schreiber v. Carey*, 48 Id. 214, all citing the principal case.

MORTGAGOR OR HIS SUCCESSOR IN INTEREST IS NECESSARY PARTY to an action foreclosing the mortgage. It is only when the owner of the mortgaged premises has had his day in court that a valid decree can pass for its sale: *Goodnow v. Ewer*, 76 Am. Dec. 545, and note 550; where the grantee or successor in interest of the mortgagor is not made a party to the proceedings, his equity of redemption will not be affected by the decree in foreclosure: *Childs v. Childs*, 75 Id. 512, and note 517; purchaser at foreclosure sale is subrogated to the rights of the mortgagor: *Id.*

CENTRAL BANK OF WISCONSIN v. KNOWLTON.

[12 WISCONSIN, 624.]

WHERE CORPORATION IS PLAINTIFF in an action, it need not be alleged in the complaint that plaintiff is a corporation.

PLAINTIFF sued defendant, but did not aver in the complaint that plaintiff was a corporate body. Defendant demurred to the complaint, on the ground that it does not appear that plaintiff had legal capacity to sue. The demurrer was overruled, and defendant appealed.

Prichard and Jackson, for the appellants.

Conger and Hawes, for the respondent.

By Court, COLE, J. In the case of *Farmers' and Millers' Bank v. Sawyer*, 7 Wis. 379, this court expressed the opinion that, where a suit was brought by a corporation, it was not necessary to allege that the plaintiff was a body corporate, created by or under the laws of this or any other state, and had capacity to sue, and that a demurrer to a complaint upon that ground would be bad. It is true that the precise question before the court in that case was, whether the demurrer was frivolous, and we held that it was not. But still we supposed that a demurrer to a complaint on the ground that it did not aver that the plaintiff was a corporation was not well taken. The following cases adjudge that precise point, as we understand them: *Harris v. Muskingum Mfg. Co.*, 4 Blackf. 267 [29 Am. Dec. 372]; *Richardson v. St. Joseph Iron Co.*, 5 Id. 146; *Bennington Iron Co. v. Rutherford*, 18 N. J. L. 105 [85 Am. Dec. 528]; S. C., Id. 158; *Union Mut. Ins. Co. v. Osgood*, 1

Duer, 707; *Zion Church v. St. Peter's Church*, 5 Watts & S. 215; *Bank of Louisville v. Edwards*, 11 How. Pr. 216; *Holyoke Bank v. Haskins*, 4 Sandf. 675; *Rees v. Conococheague Bank*, 5 Rand. 326 [16 Am. Dec. 755]; *Bank of U. S. v. Haskins*, 1 Johns. Cas. 132.

The following authorities hold that, where a corporation sues, the declaration need not set forth by averment how it was incorporated; but upon the general issue pleaded, it must be proved that it is a corporation: *Bank of Auburn v. Weed*, 19 Johns. 299; *Bank of Utica v. Smalley*, 2 Cow. 770 [14 Am. Dec. 526]. But this rule has been changed by section 3, chapter 148, revised statutes of 1858 (so far as domestic corporations are concerned), which declares that "in actions by or against any corporation created by or under any statute of this state, it shall not be necessary to prove, on the trial, the existence of such corporation, unless the defendant, in his answer, shall have denied that the plaintiff is a corporation, and annexed thereto an affidavit of the truth of such answer."

The counsel for the appellants contends that, by implication at least, this section requires that the complaint should aver that the plaintiff is a corporation, since it speaks of the defendant's denying the existence of the corporation in his answer. He thinks it involves a gross solecism to say that a party shall deny what has not been affirmed. But we think this is refining too much upon the language of the statute. It is very easy for a party to determine from a complaint whether the action is brought by a corporation or a natural person. If the suit is by the former, and the defendant wishes to litigate the question as to whether there is such a corporation or not, he can easily allege in his answer that no such corporation exists, verifying the answer by an affidavit, and then the burden will be thrown upon the plaintiff of proving its charter or act of incorporation. This provision was undoubtedly enacted to relieve the plaintiff from the expense and inconvenience of proving its charter, in every case of an action by a domestic corporation, where the general issue was pleaded. They have the same statute in New York, and the courts of that state have given it this construction: *Bank of Genesee v. Patchin Bank*, 13 N. Y. 309; *Waterville Manufacturing Co. v. Bryan*, 14 Barb. 182.

It follows from these views that the order of the circuit court overruling the demurrer to the complaint must be affirmed.

WHERE CORPORATION BRINGS ACTION, it need not be alleged in the complaint that plaintiff is a corporation: *Raine v. City of Oshkosh*, 14 Wis. 374; *Chickering Lodge v. McDonald*, 16 Id. 113; and *Williams M. & R. Co. v. Smith*, 33 Id. 532, all citing the principal case. The statute of Wisconsin provides that in actions by or against any corporation it shall not be necessary to prove on the trial the existence of such corporation unless the opposite party deny the existence of such corporation, in his pleading, and also in an affidavit attached thereto: R. S., sec. 3, 11, c. 148.

CORPORATION PLAINTIFF MUST ALLEGE AND PROVE ITS CORPORATE EXISTENCE: *Halloway v. Memphis, El Paso, and Pacific R. R.*, 76 Am. Dec. 68.

JUDICIAL NOTICE OF EXISTENCE OF CORPORATIONS: *Halloway v. Memphis, El Paso, and Pacific R. R.*, 76 Am. Dec. 68, note 71.

ALLEGATION OF CORPORATE EXISTENCE, when must be alleged and proved, and when need not be: *Halloway v. Memphis, El Paso, and Pacific R. R.*, 76 Am. Dec. 68, note 71.

JONES v. COSTIGAN.

[12 WISCONSIN, 977.]

ACTION FOR INJURY DONE TO REALTY may be maintained by a holder of a mortgage upon such realty, who has obtained a judgment foreclosing such mortgage, and directing the sale of the realty, when such injury was done to said premises before said realty was sold under such judgment, and prevented the full amount of the mortgage debt from being realized out of the premises, the mortgagor being insolvent, and the injury being committed wrongfully and fraudulently, with the intent to injure the holder of the mortgage.

PLAINTIFF, who is an assignee for the benefit of creditors of his assignor, received from such assignor a mortgage which he foreclosed, and procured a judgment and order of sale of the mortgaged premises; but prior to such sale defendants wrongfully and fraudulently injured said premises. Plaintiff sued to recover damages therefor. Defendants objected to the sufficiency of the complaint in their answer. The court ruled that the complaint did not state facts sufficient to constitute a cause of action, and dismissed the action. Plaintiff appeals.

Enos and Hall, for the appellant.

Gill, Barber, and Fribert, for the respondents.

By Court, PAINE, J. The question presented in this case is, whether the owner of a mortgage upon land, who has obtained a judgment of foreclosure and sale, can maintain an action for an injury committed upon the premises before the sale, which impairs the security and prevents the full amount of the debt from being realized, the mortgagor being insolvent, and which was committed wrongfully and fraudulently, with

the intent to injure the holder of the mortgage? Such is substantially the case made by the complaint, and the court below dismissed it as not stating facts sufficient to constitute a cause of action.

It was contended, with much ingenuity, by the counsel for the respondent, that the action is not maintainable. And his conclusion was based upon what he claimed to be the result of the American authorities, that is, that a mortgagee has no interest in the land, and therefore cannot support an action for an injury to it. But we think this is making an extreme application of the doctrine alluded to, and one which ought not to be sustained.

It may be conceded that the mortgagor is the owner of the fee, and the mortgagee has only a lien or incumbrance on the land. In progressing from the common-law rule, that the mortgagee was the owner of the legal title, and the mortgagor had only an equitable interest remaining, to the equitable rule, that the mortgagor is to be considered as the owner, and the mortgagee as having a mere security, there has been much confusion and uncertainty as to the precise character of the interests of both. But it will be observed that these questions have generally arisen in settling other collateral questions arising out of the existence of the mortgage, such as the descent of the legal title, rights of dower, or rights of execution creditors against the mortgagor or mortgagee. And the conclusion which has been arrived at, that the mortgagor is to be regarded as the owner of the land, has not been based upon any diminution of the rights of the mortgagee, but upon the assumption that this conclusion was entirely consistent with the preservation of all his rights, according to the real intent of the contract, which was merely that he should have a security upon the land for his debt. When, therefore, it is said that the mortgagee has no interest in the land, this general language must be held to mean that the mortgagor is considered, for most purposes, as the owner, subject, however, to the right of the mortgagee to preserve and enforce his lien. And this right seems to us all that should be required to sustain this action.

For it is the boast of the law that there is no right without a remedy. And for the purpose of practically carrying out this maxim, the action on the case at common law was devised and held in reserve to redress those wrongs which did not find a remedy in any of the established forms of action. The right here is conceded. The mortgagee has a valid incumbrance

on the land, which gives him the legal right to subject it to the payment of his debt. The wrong must also be conceded for the purposes of the case. For it is alleged that the defendants fraudulently and wrongfully, and with intent to injure the plaintiff, diminished the value of the land by removing buildings and destroying trees, so that the plaintiff was prevented from subjecting the whole land and all its value to the payment of his debt, as he had a legal right to do. Now, if there is no remedy for this, the law boasts of what it does not perform. The right is clear, and is a legal right. The wrong is palpable—but there is no redress. If there was anything in the nature of the case that made such redress impracticable, of course that would be a good answer, for the law neither requires nor undertakes to perform impossibilities. But when the facts present what would have been properly the subject of an action on the case, and the redress is entirely practicable in such an action, we think that justice ought not to fail by an extreme application of the doctrine relative to the rights of a mortgagee, which was established to reduce him to the position of an incumbrancer, but was not designed to deprive him of protection as such.

Regarding this action in this light, the substance of the injury is the destruction or impairing of the security. Sustaining it is, therefore, not at all inconsistent with the cases which hold that the mortgagee, not having the right of possession, cannot maintain an action for a trespass on the land. A trespass might be committed, and a considerable injury caused, and yet the security remain unimpaired. The argument of the counsel would hold good as to such an action. Because the fact might be admitted, and it would not follow that any right of the mortgagee had been injured. But when it appears that the injury is such as lessens the security and renders it inadequate, then it does appear that he is injured, and unless he can maintain an action, his interest may be wantonly or maliciously destroyed with impunity.

For it is no answer to say that he may resort to an injunction; it being conceded that courts of equity would restrain the commission of such waste as impairing the security. For it is obvious that it might, in many cases, be committed without the party's knowledge. And the very fact that courts of equity will interfere in such cases to prevent the injury seems to sustain the right of action for it after it is committed. For it is difficult to comprehend any reasoning by which the interference in the one case could be justified, which would not, at

the same time, sustain the right of action in the other. Counsel seemed to feel the difficulty of this position, and attempted to explain the action of courts of equity, by saying that they enjoined the waste, not because the mortgagee had any legal right in the land which was injured by it, but because it was a violation of good faith on the part of the mortgagor. But surely, courts of equity do not interfere to enforce the observance of good faith, where no rights are to be interfered with by its violation. And their interference at all can be justified only on the assumption that the mortgagee has an interest which is entitled to protection, and is injured by such a destruction of the value of the property as leaves it an inadequate security. And it would seem a most inexplicable anomaly for the law to say to him, through one of its tribunals, that if he could ascertain beforehand that such an injury was contemplated, it would protect him by the extraordinary remedy of injunction; and yet, when it was inflicted before he became aware of the intention to commit it, to tell him, through another tribunal, that he had no right which had been violated, and was entitled to no redress. We think, therefore, upon principle, that the action should be sustained.

And the authorities justify the same conclusion. It is conceded by the counsel for the respondent, that it is supported by the following: *Van Pelt v. McGraw*, 4 N. Y. 111; *Gardner v. Heartt*, 3 Denio, 232. The principle on which the action rests is also established in *Yates v. Joyce*, 11 Johns. 136, which was an action by a judgment creditor for an injury to real estate on which the judgment was a lien, the debtor being insolvent, and the defendant having committed the injury wrongfully, with a view to impair the plaintiff's security. The same doctrine is also approved in *Lane v. Hitchcock*, 14 Id. 213; see also *Smith v. Moore*, 11 N. H. 55.

These cases not only fully sustain this action, but their reasoning, particularly that in *Van Pelt v. McGraw*, *supra*, furnishes a satisfactory answer to the cases most strongly relied on by the respondent. The same remarks there made in regard to *Peterson v. Clark*, 15 Johns. 205, are applicable to *Cooper v. Davis*, 15 Conn. 556. That was an action where the title to mill-stones was involved, which had been severed from the premises, and sold by the mortgagor while in possession. The case turned upon the title to the mill-stones, and the question whether an action like the present could be sustained was not involved. The language of the court relied on relates to the action for waste, as known at the common law, for an

injury to the property, without reference to the question whether the security was injured.

The right of action seems entirely clear, where the injury is committed by a mere trespasser. It is not at all impeached by the fact that the mortgagor might also sustain an action for the same injury. It is frequently the case that different persons, having different interests in property, have each a right of action for an injury to it, each recovering the damage to his own interest. The only difficulty that could arise would be where the injury is committed by the mortgagor, or under his direction. He being the owner, and having the right to treat the property for all purposes as his own, subject, however, to the rights of the mortgagee, the difficulty would be to define precisely what acts should render him, or those acting under his authority, liable to an action. But we think that *Van Pelt v. McGraw*, *supra*, establishes the true rule, and that where an injury is committed by the mortgagor, or others acting by his direction, knowing his insolvency, and the existence of the security, and knowing that the act complained of will impair it, the action should be sustained.

The objection that the appellant cannot maintain the action as trustee, for the reason that it was a tort, and the right of action therefor could not be assigned, is not valid. If the injury had been committed before the assignment, then it would be good; but here it was committed after the assignment, and the assignee, holding the title for the benefit of all the parties for whom it was made, is the proper plaintiff.

The judgment is reversed, with costs, and the cause remanded for further proceedings.

THE PRINCIPAL CASE IS CITED WITH APPROVAL to the point that the holder of a mortgage may maintain an action for damages to the real estate mortgaged, in the case of *Whorton v. Webster*, 56 Wis. 371, citing the principal case.

MORTGAGOR IS, IN SOME RESPECTS, TO BE CONSIDERED IN POSSESSION for the benefit of the mortgagee, and a court will interpose to prevent the destruction or waste of the mortgaged estate by the former, and those claiming under him, where the security of the mortgagee is endangered: *Schreiber v. Carey*, 48 Wis. 215, citing the principal case.

INJUNCTION IS PROPER REMEDY to prevent threatened injuries to real property which will endanger the security of a mortgage: *Schreiber v. Carey*, 48 Wis. 215; *Kimball v. Darling*, 32 Id. 686, citing the principal case.

PURCHASER AT FORECLOSURE SALE may maintain an action on the case against the mortgagor for cutting and carrying away timber during the period of redemption: *Stout v. Keyes*, 43 Am. Dec. 466; or he may maintain trespass against a lessee of the mortgagor who enters and cuts the growing crops, if the lease was made subsequent to the mortgage: *Lane v. King*, 24 Id. 105, and note 108.



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ACCOUNTS.

1. PRESUMPTION IS, THAT ALL TRANSACTIONS BETWEEN SAME PARTIES are a part of the same account, but two accounts may exist between the same parties, and the presumption may be rebutted by proving this fact. In such a case, a judgment on one account would not bar a judgment on the other account. *Borgesser v. Harrison*, 757.
2. JUDGMENT UPON RUNNING ACCOUNT IS BAR to another action upon the same account, although the items upon which the second suit is based were omitted from the claim in the first action, by plaintiff, said items being due when the first action was commenced. *Id.*

See CO-TENANCY, 1-4.

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See HUSBAND AND WIFE, 3; NOTICE, 1.

ADMINISTRATORS.

See EXECUTORS AND ADMINISTRATORS.

ADULTERY.

See DOWER, 1.

ADVERSE POSSESSION.

1. To CONSTITUTE ADVERSE ENJOYMENT OF INCORPOREAL HEREDITAMENT, the act of enjoyment must be of such a character as to afford ground for an action by the other party; it must be either an invasion of his vested rights, or else consequently injurious to their free exercise. *Klein v. Gehring*, 565.
2. FOUNDATION OF PRESCRIPTIVE TITLE IS PRESUMED GRANT of the party whose rights are adversely affected; but where it appears that the enjoyment has existed by the consent or license of such party, no presumption of grant can be made. *Id.*
3. TITLE BY PRESCRIPTION MUST BE SPECIALLY PLEADED. *Heatt v. Morris*, 260.

See ANCIENT LIGHTS, 2, 3; HIGHWAYS, 1; MINES AND MINING, 2-4; STATUTE OF LIMITATIONS.

AGENCY.

1. FACT AND SCOPE OF AGENCY CREATED AND PROVED BY WRITING ARE QUESTIONS OF LAW, and are properly decided by the court. *Savings Fund Society v. Savings Bank*, 390.
 2. FACT AND SCOPE OF AGENCY NOT CREATED BY WRITING, but implied from the conduct of the principal, and proved by witnesses, are questions of fact, and should be left to the jury. *Id.*
 3. GENERAL AGENT IS ONE HAVING AUTHORITY TO TRANSACT ALL OF ANOTHER'S BUSINESS of a particular kind; and the employer is bound by all the agent's acts done within the scope of his employment. *Id.*
 4. SPECIAL AGENT IS ONE EMPLOYED ABOUT SPECIFIC ACTS ONLY; and the employer is not bound by the agent's action unless the latter's authority is strictly pursued. *Id.*
 5. MONEY DEPOSITED IN BANK BY AGENT AS ORDINARY DEPOSIT, the agent stating that it was his principal's money, but desiring the officer to place it to his credit on the books of the bank, alleging that it might have occasion to use it for the benefit of his principal, may be followed by the principal in a court of equity. *Whitley v. Foy*, 236.
 6. CLERK OF AGENT TO SELL LANDS, WHO IS EMPLOYED OR CONCERNED IN AFFAIRS OF SELLER relating to the lands, is, alike with his principal, prohibited from purchasing, and if he does so, the seller may compel him to reconvey the lands, or account for their proceeds. *Gardner v. Ogden*, 192.
 7. WHEN AGENT, IN MAKING LOAN, SECURES BONUS FOR HIMSELF WITHOUT HIS PRINCIPAL'S KNOWLEDGE, the principal does not, by receiving the security and seeking to enforce it, ratify such unauthorized act of the agent. *Condit v. Baldwin*, 137.
 8. NOTICE TO AGENT IN TRANSACTIONS FOR WHICH HE IS EMPLOYED, and within the scope of the authority confided to him, is notice to the principal, and applies equally to a corporation as to a natural person. *Nashville etc. R. R. Co. v. Elliott*, 506.
- See CORPORATIONS, 89; PARTNERSHIP, 2; STATUTE OF FRAUDS, 3; VENDOR AND VENDEE, 1.

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See NEGOTIABLE INSTRUMENTS, 10.

ANCIENT LIGHTS.

1. DOCTRINE OF ANCIENT LIGHTS IS NOT FAVORED in TEXAS. *Klein v. Gehrung*, 565.
2. ENGLISH DOCTRINE OF PRESCRIPTIVE RIGHT TO PREVENT OBSTRUCTIONS TO WINDOW LIGHTS is not part of the law of Texas, and there can there be no adverse user of lights. *Id.*
3. PRESCRIPTIVE RIGHT TO PREVENT ADJACENT PROPRIETOR FROM INCLOSING OR BUILDING upon his own land is not acquired by the use of an adjoining house having windows looking out upon his land, and receiving light and air from that direction for a period of ten years. *Id.*

ANIMALS.

1. OWNER OF DOMESTIC ANIMALS IS NOT LIABLE FOR DAMAGES caused by their trespassing upon an unfenced cultivated field. *Jones v. Witherspoon*, 203.

2. COMMON-LAW RULE REQUIRING DOMESTIC ANIMALS TO BE INCLOSED is not in force in North Carolina. *Id.*

APPEAL.

WHERE, ON APPEAL, NO ERROR IS ASSIGNED, and an error does not go to the foundation of the action, the court may affirm the judgment; but if the plaintiff suggests delay, the court is required to revise the rulings of the lower court. *Riggs v. Horde*, 584.

ASSIGNMENTS.

See BONDS, 1-3; INSOLVENCY.

ASSIGNMENTS FOR BENEFIT OF CREDITORS.

1. GENERAL VOLUNTARY ASSIGNMENTS FOR BENEFIT OF CREDITORS WILL PASS ALL PERSONAL PROPERTY OF ASSIGNOR, wherever situated, if made according to the laws of the domicile of the assignor, unless their operation is limited or restrained by some local law or policy of the state where the property is situated. *Hanford v. Paine*, 586.
2. ASSIGNMENTS OF PERSONAL PROPERTY FOR BENEFIT OF CREDITORS ARE CONTROLLED by the Vermont statute of 1852, only when the assignor resides in Vermont, and the assignment is to be carried into effect there by the assignee. *Id.*
3. PROVISION DIRECTING ASSIGNEE TO CONVERT ASSIGNED PROPERTY "INTO CASH as soon as the same may conveniently and properly be done," does not render void an assignment for the benefit of creditors. Such a provision is supererogatory and harmless. *Ogden v. Peters*, 122.
4. SOLVENCY OF DEBTOR, EITHER IN HIS OWN ESTIMATION OR IN FACT, DOES NOT INVALIDATE HIS ASSIGNMENT of his property for the payment of his debts. *Id.*
5. INTENTION OF DEBTOR TO HINDER OR DELAY CREDITORS RENDERS ASSIGNMENTS FRAUDULENT and void, but that intention cannot be inferred from the solvency of the assignor any more than from his insolvency. *Id.*
6. ASSIGNMENT FOR BENEFIT OF CREDITORS OF PERSONAL PROPERTY SITUATED IN VERMONT REQUIRES CHANGE OF POSSESSION, in order to place the property beyond the reach of process against the assignor, although the assignment is made according to the laws of another state. *Rice v. Courtis*, 597.
7. CHANGE OF POSSESSION OF PERSONAL PROPERTY IS NOT EFFECTED BY MERE NOTICE OF ASSIGNMENT given by an assignee, for the benefit of creditors to a third person in whose possession the property was, so as to place the property beyond the reach of process against the assignor. It seems that the assignee should have made the third person his bailee. *Id.*

BAIL.

TERMS "PROOF IS EVIDENT OR PRESUMPTION GREAT," in Texas bill of rights, are intended to indicate the same degree of certainty, whether the evidence be direct or circumstantial. The design is to secure the right of bail in all cases except those in which the facts might show, with reasonable certainty, that the prisoner is guilty of a capital offense. *McCoy v. State*, 520.

BAILMENTS.

See CRIMINAL LAW, 3; RAILROADS, 1.

BANKS AND BANKING.

1. WHERE BANK DEPOSITOR DRAWS CHECK for a portion of his deposit in favor of a third person, and upon presentation payment is refused, the holder may recover of the bank the amount of the check, especially where the bank's charter provides that it "shall receive money on deposit, and pay away the same to order free of expense." *Fogarty v. State Bank*, 468.
2. BANK RECEIVES FUNDS OF DEPOSITOR WITH TAUT ENGAGEMENT to pay them out to his order, or check drawn in his own favor, or in favor of third persons, upon the one condition of being notified of the existence of the check, in such manner as to free it from danger of being liable to pay the same amount twice. *Id.*
3. L., AS CASHIER OF DEFENDANT BANK, proposed by letter to sell plaintiffs a bill of exchange drawn by B. & Co. for five thousand dollars, at the price of principal, interest, and exchange. Plaintiffs accepted the proposition by letter, forwarding the money in payment, which L. received and gave credit, as expressed by a letter to plaintiffs, inclosing another bill made by strangers to plaintiffs, indorsed by a stranger "without recourse," for five thousand dollars, charging therefor the same price proposed for the B. & Co. bill. In this letter, plaintiffs were informed that the B. & Co. bill was gone, adding, but this bill "is perfectly safe." Plaintiffs replied by letter as follows: "Your favor with stated inclosure is received, and is very satisfactory." Plaintiffs exercised all due diligence, but failed to collect the bill. *Held*: 1. That the acts of the cashier L., in this transaction, are to be regarded as the acts of the defendant bank by its agent; 2. Written assurance of cashier, which accompanied bill sent to plaintiffs, that the bill "is perfectly safe," amounts to a warranty, or representation, on part of defendant in the nature of a guaranty that the bill was collectible. *Sturges v. Bank of Circleville*, 296.

See AGENCY, 5; CORPORATIONS, 11.

BETS.

See WAGERS.

BILLS OF LADING.

See NEGOTIABLE INSTRUMENTS, 13-15.

BONDS.

1. WHERE OBLIGOR OF BOND PAYS CERTAIN AMOUNT THEREON under promise that it shall be indorsed as part payment on the bond; but without such indorsement the holder assigns it, and the obligor is obliged to pay the amount of the bond, he cannot recover of the former holder the amount so paid. *Decker v. Adams*, 65.
2. BOND CANNOT BE LAWFULLY ASSIGNED FOR MORE than is due upon it, so as to give the assignee any right to demand more than is due. In paying it, therefore, the obligor is entitled to a deduction of any payment which he may have made to a previous holder, whether indorsed upon the bond or not. *Id.*
3. HOLDER OF BOND WHO ASSIGNS IT for more than is due thereon is liable to the assignee for the deficiency. The right of action is in the assignee, and is an unassignable right. *Id.*

4. MUNICIPAL BONDS IN AID OF RAILROAD ARE NOT COMMERCIAL PAPER in Pennsylvania, and even in the hands of innocent and remote purchasers are subject to the equities existing against them when in the hands of the first purchasers from the company, and the interest coupons are subject to the same equities. *Diamond v. Lawrence County*, 429.
5. PURCHASERS OF MUNICIPAL BONDS ISSUED IN AID OF RAILROAD are bound to take notice of the law under which they were issued. *Id.*
6. PAYMENT OF MUNICIPAL-AID BONDS WILL BE ENFORCED ONLY to the extent of the money which they brought to the company. *Id.*

See CORPORATIONS, 24, 25.

BUILDING ASSOCIATIONS.

1. INSTALLMENTS PAID ON STOCK BY MEMBER OF BUILDING ASSOCIATION are not payments upon a mortgage due from the member to the association, although for some purposes they have been treated as such by the courts. *North America Building Ass'n v. Sutton*, 349.
2. INSTALLMENTS PAID ON STOCK TO BUILDING ASSOCIATION by one of its members after the trial of an action of the association against such member, and after judgment had therein, works an estoppel against such association, and it cannot afterwards claim that said stock was treated in said case as so much money paid on the member's loan to the association. *Id.*
3. MEASURE OF DAMAGES IN ACTION AGAINST BUILDING ASSOCIATION for wrongfully refusing to permit the transfer on its book of certain shares of its stock is the sum paid on said stock as dues and interest thereon from the time of the several payments. *Id.*

BURDEN OF PROOF.

See NEGLIGENCE, 3.

CERTIFICATES OF DEPOSIT.

See NEGOTIABLE INSTRUMENTS, 3, 4, 18, 19.

CHECKS.

- MONEY ADVANCED ON CHECKS OF ONE WHO HAS OVERDRAWN HIS ACCOUNT will be regarded as an ordinary loan. *Rock River Bank v. Sherwood*, 689.

See BANKS AND BANKING.

CHOSES IN ACTION.

See INSOLVENCY.

COMMON CARRIERS.

See RAILROADS, 1, 6.

CONDITIONS.

See CONTRACTS, 3; WILLS, 17.

CONSTITUTIONAL LAW.

1. LEGISLATURE MAY IMPOSE TAX ON LOCAL DISTRICT TO PAY FOR PUBLIC IMPROVEMENT ALREADY MADE; and such action interferes with no contract, and divests no vested rights. *Schenley v. Commonwealth*, 359.

2. LEGISLATURE MAY PASS RETROSPECTIVE LAWS AFFECTING PENDING SUITS, giving new remedies, and modifying old ones, or removing impediments in the way of legal proceedings; provided that such laws do not violate the constitutional prohibitions. *Id.*
3. UNITED STATES, IN ITS POLITICAL CAPACITY, MAY ENTER INTO CONTRACTS, take bonds, receive real or other property as security for debts, and the like, in cases not previously provided for by law; and no legislative authorization is required therefor, but the power exists as incident to the general right of sovereignty; the government, as a body politic, being authorized, within the sphere of the constitutional powers confided to it, and through the instrumentality of the proper department to which those powers are confided, to enter into contracts not prohibited by law, and appropriate to the just exercise of those powers. *Dikes v. Miller*, 571.
4. STATE UNDOUBTEDLY HAS CAPACITY TO TAKE BY DEED OR DEVISE, and a release to it by a grantee of land will be operative and effectual to divest the title of the grantee. *Id.*

CONTRACTS.

1. CONTRACTS ARE TO BE INTERPRETED BY ASCERTAINING REAL INTENTIONS OF PARTIES THERETO, according to their stipulations; but in the absence of stipulations, or where they are ambiguous, the true sense of the words used should be ascertained, and what ought to be implied, in order to give them their true and full effect. For this purpose custom and usage may be resorted to. *Williamson v. Smith and Walker*, 478.
 2. CONTEMPORANEOUS PAROL UNDERSTANDING CANNOT BE SET UP TO CONTRADICT OR VARY THE TERMS OF A WRITTEN AGREEMENT. *Downie v. White*, 731.
 3. ONE WHO PREVENTS PERFORMANCE OF CONDITION, or makes it impossible by his own act, shall not take advantage of the non-performance. *Cape Fear etc. Nav. Co. v. Wilcox*, 260.
- See CONSTITUTIONAL LAW, 3, 4; CORPORATIONS; DAMAGES, 2, 3; DEEDS, 4, 5; MISTAKE, 2; PLEADING AND PRACTICE, 4, 5; SALES; USURY; WARRANTY.

CONTRIBUTORY NEGLIGENCE.

See NEGLIGENCE.

COPARCENARY.

See CO-TENANCY, 6; ESTATES, 1.

CORPORATIONS.

1. SUBSCRIBERS TO COMMON FUND FOR COMMON PURPOSE become an association of persons united for the carrying out of such purpose, as soon as the stipulated amount of money has been subscribed; and such act of association involves an agreement to organize for the purpose contemplated. *Edinboro' Academy v. Robinson*, 421.
2. EACH SUBSCRIPTION TO COMMON FUND FOR COMMON PURPOSE is contract by each associate with his fellows, in consideration of similar contracts by them to contribute to the common fund the amount subscribed, and when the full sum is subscribed and the association organized, raises a duty and liability on the part of each subscriber to pay the sum subscribed. *Id.*
3. ORGANIZATION BY LEGAL INCORPORATION OF PERSONS WHO HAVE SUBSCRIBED to a common fund for a common purpose, when regularly accomplished by the common consent of the associates, constitutes the

corporation the true and only organization to which subscriptions are to be paid, and the proper and legal party to demand and enforce their payment. *Id.*

4. IN ACTIONS ON SUBSCRIPTIONS TO COMMON FUND, where the associates legally incorporate, the proceeding should be in the name of the corporation; but if the names of the trustees have been added as parties plaintiff, an amendment may be allowed so as to permit the corporation to appear simply by its corporate name. *Id.*
5. CORPORATION CAN MAKE NO CONTRACT NOT NECESSARY, either directly or indirectly, to enable it to answer the purpose of its creation. *Beck River Bank v. Sherwood*, 669.
6. CONTRACT OF CORPORATION, FOREIGN TO PURPOSE or object of its creation, is void. *Id.*
7. CORPORATIONS MAY RESORT TO USUAL AND CONVENIENT MEANS OF EXERCISING POWERS GRANTED. *Mills v. Gleason*, 721.
8. CORPORATION IS LIABLE FOR CARELESS OR WRONGFUL ACT OF ITS AGENT, if the act be done in the due course of the business of the corporation, though the appointment of the agent be not under seal. *N. Y. & W. Printing & Tel. Co. v. Dryburg*, 338.
9. RECEIPTS BIND CORPORATION WHEN THEY ARE GIVEN BY ITS OFFICERS for money received by them for the corporation from a member in the ordinary course of the business of the corporation, and especially so when they are contained in a book furnished for that purpose. The fact that it contains receipts for various classes of payments, such as dues, fines, interest, etc., does not alter the rule. *North America Building Ass'n v. Sutton*, 349.
10. CORPORATION, THOUGH WITHOUT POWER TO MAKE NOTE FOR ITS OWN DEBT, MAY RECEIVE NOTE OF NATURAL PERSON, and it will be good in the hands of an innocent holder, though received for an unauthorized purpose. *Blunt v. Walker*, 709.
11. TRANSFER IS VALID WHEN OWNER OF BANK STOCK delivers a certificate thereof, with an indefinite power of disposition, in blank to her agent, who representing it as his own, transfers the certificate and power to a purchaser in the course of business as payment for a loan. *State Bank v. Cox & Co.*, 458.
12. CORPORATION, IN TAKING MORTGAGE TO SECURE DEBT, IS NOT DEALING IN LANDS. *Blunt v. Walker*, 709.
13. CORPORATION, THOUGH NOT EMPOWERED TO HOLD AND DEAL IN REAL ESTATE, may yet acquire and transmit title to it, as an incident to its powers to make general contracts touching a particular business; and so also of a corporation whose charter, in express words, prohibits dealing in real estate, for a corporation whose charter is merely silent on this point is impliedly prohibited to the same extent. *Id.*
14. STOCK SUBSCRIPTION IS CONTRACT BETWEEN CORPORATION ON ONE SIDE AND SUBSCRIBER ON OTHER, and courts will enforce it for or against either. *Id.*
15. CORPORATION WITH POWER TO MAKE CONTRACT, AND NOT RESTRICTED IN MANNER of making it, as to such contract stands on the same footing as a natural person, and may adopt any mode calculated to accomplish it which the individual could. *Id.*
16. POWER CONFERRED BY CHARTER UPON DIRECTORS TO DECIDE TIME, manner, and proportions in which the stockholders shall pay for their respective shares authorizes them to give a subscriber credit. *Id.*

17. RAILROAD COMPANY, IN CARRYING OUT ENTERPRISE authorized by its charter, has power to assign its stock subscriptions. *Downie v. Hoover*, 730.
18. CASE OF DOWNIE v. HOOVER, ANTE, p. 730, followed as to right of railroad company to assign stock subscriptions. *Downie v. White*, 731.
19. SECRET AGREEMENT WITH RAILROAD COMPANY THAT STOCK SUBSCRIPTION OF DEFENDANT WAS MERELY TO BE COLORABLE is a fraud upon other subscribers of stock, and is not a defense. The written subscription should be enforced without regard to such secret agreement. *Id.*
20. RAILROAD COMPANY MAY DISPOSE OF ITS STOCK TO SUBSCRIBER ON CREDIT, and take as security the note and mortgage of the subscriber, where the company is authorized by its charter to receive subscriptions to its capital stock in the manner in which such corporations usually are. *Bliss v. Walker*, 709.
21. RAILROAD CORPORATION IS NOT PROHIBITED FROM TAKING NOTE AND MORTGAGE AS SECURITY for a debt by a provision of its charter that it shall not hold, purchase, or deal in any lands other than such as are necessary for use in the running of the road. Such provision is intended to prohibit the corporation from purchasing, holding, or dealing in real estate directly, and in a manner unconnected with the lawful and proper management and control of its affairs and business; and it is not designed to prevent its acquiring an interest therein incidentally, whenever, in the proper exercise of its powers, it becomes necessary for it to do so in order to protect its legal rights. *Id.*
22. WHEN CORPORATION IS PLAINTIFF in an action, it need not be alleged in the complaint that plaintiff is a corporation. *Central Bank of Wisconsin v. Knowlton*, 769.
23. RATIFICATION BY MUNICIPAL CORPORATION WILL GIVE VALIDITY TO ACTS UNAUTHORIZED at the time of their performance, because the charter had not yet been published. *Mills v. Gleason*, 721.
24. CITY HAS AUTHORITY TO BORROW MONEY AND ISSUE ITS BONDS THEREFOR, in the absence of any restriction, as incidental to the execution of the general powers conferred by the charter to purchase fire apparatus, cemetery grounds, to establish markets, and to do many other things, for the execution of which money would be necessary as a means. *Id.*
25. MUNICIPAL CORPORATION AUTHORIZED TO CONTRACT DEBTS AND EXECUTE UNDERTAKINGS REQUIRING MONEY may borrow money for those purposes and issue its bonds or other obligations therefor without any direct statutory authorization; and the fact that on previous occasions statutes have been passed authorizing such issuances of bonds is not conclusive that the corporation has not such authority independent of statute. *Id.*
26. CONFERRING POWER OF TAXATION UPON MUNICIPAL CORPORATION does not deprive it of the power of borrowing money. *Id.*
27. UNDER CITY CHARTER PROVIDING THAT COMMON COUNCIL SHALL CONSIST of mayor and twelve aldermen, and that a vote to levy a tax shall be passed by two thirds of the members elect, the mayor is not to be counted in the number of which two thirds must be taken, but a two-thirds vote of the aldermen is sufficient. *Id.*
28. FAILURE TO EXERCISE POWER vested in a municipal corporation by a statute does not render such corporation liable for damages occasioned by such failure. *Carr v. Northern Liberties*, 342.
29. RIGHT TO ERECT SEWERS and other drainage works given to a municipal corporation does not impose a duty to erect them. *Id.*

30. RIGHT IN CITIZEN TO PERFORMANCE OF ACT IMPOSES DUTY upon the officer who is authorized to perform it, but where the right depends upon the grant of an authority, and that authority is discretionary, no legal duty is imposed. *Id.*
 31. ORDINANCE MADE NULL AND VOID FOR WANT OF RECORDING MAY BE MADE VALID and binding by act of the legislature. *Schenley v. Commonwealth*, 359.
- See AGENCY, 8; BUILDING ASSOCIATIONS; HIGHWAYS, 2, 10; STATUTE OF LIMITATIONS; SUBSCRIPTIONS.

COSTS.

See EXECUTORS AND ADMINISTRATORS, 10.

CO-TENANCY.

1. ONE TENANT IN COMMON MAY MAINTAIN SUIT AGAINST HIS CO-TENANT who has used and occupied the whole of the common property, for an account of the rents and profits. *Early and Wife v. Friend*, 649.
2. WHEN PROPERTY OWNED BY SEVERAL TENANTS IN COMMON IS USED AND OCCUPIED BY ONE ONLY, the property being of such a nature as not to admit of its use and occupation by several, or when the property, though capable of use and occupation by several, is yet so used and occupied by one as, in effect, to exclude the others, he receives more than comes to his just share or proportion within the meaning of the Virginia statute, and is accountable to the others. *Id.*
3. TENANT IN COMMON WHO OCCUPIES AND USES WHOLE OF COMMON PROPERTY himself is liable to his co-tenants for a reasonable rent therefor in the condition in which it was when he took possession. *Id.*
4. INTEREST SHOULD BE PAID BY OCCUPYING TENANT IN COMMON upon the rents found to be due from him to his co-tenants. *Id.*
5. ONE TENANT IN COMMON OF LAND CANNOT MAINTAIN TREMPASS QUARE CLAUSUM FREGIT against another for entering upon the common property, claiming exclusive ownership of the whole, and cutting and carrying away all the timber thereon. *Wall v. Richardson*, 622.
6. JOINT TENANTS AND CO-PARCENERS STAND IN CONFIDENTIAL RELATIONS IN REGARD TO ONE ANOTHER'S INTEREST, and are not permitted in equity to acquire an interest in the property hostile to that of the other; therefore, a purchase by one of an incumbrance on the joint estate, or an outstanding title to it, is held at the election of his co-tenants, within a reasonable time, to inure to the equal benefits of all the tenants, upon a condition that they will contribute their respective ratios of the consideration actually paid. *Roberts v. Thorn*, 552.
7. RULE THAT ONE OF TWO TENANTS IN COMMON, WHO ACQUIRES SUPERIOR OUTSTANDING TITLE must hold it in trust for the other, upon that other paying his proportion of the purchase-money, only applies where the interest accrues under the same instrument, or act of the parties or of the law, or where they have entered into some engagement or understanding with one another. *Id.*

See ESTATES, 1; PARTITION.

COVENANTS.

THOUGH COVENANT BE WITH TWO OR MORE JOINTLY, it shall be taken to be several, and each of the covenantees may bring an action for the

breach, and for his particular damage, if the interest and cause of action of each is several. The insertion or omission of words of severance makes no difference as to the covenantees, the action in all cases following the interest, without regard to the words of the covenant. *Little v. Hobbie*, 275.

CREDITORS' BILLS.

CREDITORS' BILL.—EQUITY WILL ALLOW CREDITOR who has failed to present and prove his demand, before the day appointed in the order calling in creditors, to come in with his claim, at any time before the actual distribution of the assets, upon his contributing his fair proportion of the expenses of the suit; but the creditor is not entitled to protection if he is guilty of laches in filing his petition. *Ex parte Naylor v. Smith*, 457.

CRIMINAL LAW.

1. **INDICTMENT FOR CRIME OF ACCESSARY BEFORE FACT** to the commission of a felony cannot be sustained unless the guilt of the principal felon be established as well as the guilt of the defendant as accessary. The confession of the principal felon as to his guilt is not admissible as evidence against the accessary, it being as to him hearsay evidence. *Ogden v. State*, 754.
2. **TO CONSTITUTE LARCENY**, there must be a trespass in the taking, and the thief must take the property *animo furandi*. *Robinson v. State*, 487.
3. **BAILEE'S CONVERSION OF PROPERTY IS NOT LARCENY**, provided he takes the particular thing bailed. But if a carrier opens a bale or package of goods, or pierces a vessel of wine and takes away a part thereof, it will constitute a larceny, for here the *animus furandi* is manifest. *Id.*
4. **FACTS CONSTITUTING LARCENY AND SHOWING DISTINCTION BETWEEN TRESPASS AND LARCENY.**—A left his trunk, unlocked, and in which there was money, with B, telling him to keep the room secured. In A's absence, B took a double-eagle and applied it to his own use. This was held to be larceny. If the money itself had been handed to B to keep safely, and he had applied it to his own use, it would have been only a trespass, but here the trunk, and not the money, was left with him. *Id.*
5. **LARCENY IS COMMITTED BY ONE WHO OBTAINS POSSESSION OF PERSONAL PROPERTY BY CONSENT OF OWNER**, under the pretense of hiring it for a temporary purpose, when in fact he intends thereby to wholly deprive the owner of it, and he actually puts it to a different purpose, although he does not sell or dispose of it. *State v. Humphrey*, 605.
6. **WHERE ONE ALLEGED TO BE DEAF AND DUMB FROM HIS BIRTH IS ARRAIGNED FOR MURDER**, it should be left to a jury to determine whether he is of unsound mind, incapable of understanding the charge against him, and the nature and purpose of the trial, and his rights therein. If the jury find these issues in his favor, he should not be placed upon his trial. *State v. Harris*, 272.
7. **TO IDENTIFY CHARRED BONES AS THOSE OF MISSING WOMAN SUPPOSED TO HAVE BEEN MURDERED**, it is competent to show that certain hair-pins were found with the bones, and that the woman was in the habit of wearing such pins two or three years before. *State v. Williams*, 248.
8. **CORPUS DELICTI MAY BE PROVED BY PRESUMPTIVE OR CIRCUMSTANTIAL EVIDENCE**, but it must be strong and cogent. *Id.*
9. **INDICTMENT FOR MURDER IS SUFFICIENT**, where it charges that the murder was done "in some way and manner, and by some means, instruments, and weapons, to the jury unknown." *Id.*

10. OBJECT OF PROOF IS TO ESTABLISH ACTUAL MALICE TOWARDS DECEASED, at the time of the killing, which prompted the accused to the commission of the deed. Sufficiency of the evidence to establish it is determined, as that of any other fact, by its effect to reasonably satisfy the mind. *McCoy v. State*, 520.
11. WHERE FACTS TEND TO ESTABLISH DIFFERENT CONCLUSIONS as to the kind of malice, whether express or implied, if fresh provocation intervenes between the preconceived malice and the death, it will not be presumed that the killing was upon the antecedent malice; but although it will not be presumed, it may be proved to have actuated the person in the killing, by the circumstances and facts in the case, notwithstanding the fresh provocation. *Id.*
12. EXTERNAL FACTS AND CIRCUMSTANCES INDICATING DESIGN TO TAKE LIFE OF PERSON SLAIN may transpire at the time of the killing as well as before that time. *Id.*
13. DEFINITION OF "EXPRESS MALICE" as given by Blackstone, adopted by court as correct, namely: "Express malice is, when one with a sedate and deliberate mind, and formed design, doth kill another; which formed design is evidenced by external circumstances discovering that inward intention, as lying in wait, antecedent menaces, former grudges, and concerted schemes to do him some bodily harm." *Id.*
14. ONE IS GUILTY OF ASSAULT WITH INTENT TO COMMIT RAPE, if he lays hold of a woman with the intention of having sexual intercourse with her against her will, and she resists for a time, but ultimately yields. *State v. Hartigan*, 609.
15. FORGERY IN SIGNING NAME TO ORDER FOR GOODS.—Where code declares that "forgery is the fraudulent making or alteration of any writing to the prejudice of another's right," it is forgery to sign another's name to an order for goods, without authority, and for the fraudulent purpose of obtaining the goods on the credit of the party whose name is forged: See Code of Tenn. 1858, sec. 4718. *Hale v. State*, 488.
16. ACCEPTANCE OF FORGED ORDER FOR GOODS IS UNNECESSARY TO MAKE OUT OFFENSE OF FORGERY. It is enough that the fraudulent intent existed, and that injury might have resulted from an accomplishment of the forger's object. *Walton v. State*, 14 Tenn. 377, overruled. *Id.*

See RAIL.

CUSTOMS.

See CONTRACTS, 1; NEGOTIABLE INSTRUMENTS, 11.

DAMAGES.

1. MEASURE OF DAMAGES, in an action against the proprietors of a newspaper for neglecting to insert an advertisement of a public sale, for which they had collected the publication fee in advance, is the sum paid them for such publication, if there was no fraud on their part. Speculative damages are too remote. *Eisenlohr v. Swain*, 328.
2. DAMAGES FOR BREACH OF CONTRACT MUST BE PROXIMATE CONSEQUENCE OF BREACH. A possible loss is not sufficient ground for compensation. *Adams Express Co. v. Egbert*, 382.
3. LOSS OF PROFITS WHICH MUST HAVE RESULTED FROM FULFILLMENT OF contract may be compensated in damages. *Id.*
4. FAILURE OF EXPRESS COMPANY TO DELIVER ARCHITECTURAL PLANS, by which the sender thereof is prevented from competing for a premium,

results in a proximate loss—the loss of opportunity to compete—and for such loss the sender may recover damages. *Id.*

8. LOSS OF OPPORTUNITY TO COMPETE FOR PRIZE IN SUCH LOSS AS WILL ENTITLE INJURED PARTY TO NOMINAL DAMAGES; but to recover more, actual injury must be proved. *Id.*
- See ANIMALS, 1; BUILDING ASSOCIATIONS, 3; CORPORATIONS, 28; EMINENT DOMAIN, 3-6; EXECUTIONS, 12; INSURANCE, 1-4; NEGLIGENCE, 13; QUANTUM MERUIT, 2; TELEGRAPHS, 2, 4, 5; TRESPASS, 1, 2; WARRANTY, 10, 14; RAILROADS, 2.

DEBTOR AND CREDITOR.

WHERE RESIDENT OF MISSOURI TRANSFERRED ALL HIS HOUSEHOLD FURNITURE to his wife, his subsequent acts in moving to Pennsylvania with his wife, and there contracting debts, would not defeat the wife's title as against such Pennsylvania creditors, unless it was shown that such transaction was intended as a fraud on them. *Reid v. Gray*, 444.

See ASSIGNMENTS FOR BENEFIT OF CREDITORS; EXEMPTIONS; DEBTOR AND CREDITOR.

DEDICATION.

See HIGHWAYS, 1, 2

DEEDS.

1. ACKNOWLEDGMENT IN DEED, BY BARGAINOR, of the reception of the consideration-money, is a bar to an action at law for the purchase-money. *Mendenhall v. Parish*, 269.
2. PREMISES WILL PASS BY DEED, WHERE THEY ARE DESCRIBED AS "my house and lot in the town of Jefferson, in Ashe county, North Carolina," if the grantor has a house and lot, and only one in that town. The description is sufficient, because there is no patent ambiguity in it. *Carrson v. Ray*, 267.
3. CONSTRUCTION OF DEED IS FOR COURT. *Id.*
4. TO DETERMINE WHETHER INSTRUMENT IS TO OPERATE AS IMMEDIATE CONVEYANCE or only as executory contract, the court will look to the intention of the parties, and this is to be sought for in every part of the contract. *Stewart v. Lang*, 414.
5. INSTRUMENT IS NOT PRESENT CONVEYANCE, BUT IS MERELY EXECUTORY CONTRACT, though it contains the words of present assurance, "doth and hath by these presents granted, bargained, sold, and forever quit-claimed," etc., if it be informally drawn; called by the parties an agreement; expressed to be in consideration of future covenants to be done and performed, and with no present sum in hand paid; contains no words of inheritance; and be without the formal acknowledgment of a deed. *Id.*
6. GRANTEE OF LAND, BY ALTERING OR DESTROYING HIS TITLE DEED, does not lose his title to the land. The deed, as the instrument of conveyance, passed the title to the grantee, and therein performed its office, and its continuance in existence is not essential to a continuance of title in the grantee; but the estate remains in him until it has passed to another by some mode of conveyance recognised by law. *Van Hook v. Simmons*, 573.
7. WHERE WORD IS OMITTED IN CONDITION OF SEALED INSTRUMENT, without which the condition is insensible, the court will supply or add the

word to the condition, if the obvious meaning of the parties appears from other parts of the instrument. *Williamson v. Smith and Walker*, 478.

See CONSTITUTIONAL LAW, 4; HUSBAND AND WIFE, 2; MORTGAGES; NOTION, 1; PUBLIC LANDS, 2, 3.

DEPOSITIONS.

1. DEPOSITION TO BE ADMISSIBLE must be taken in the regular course of judicial examination, the witness must first be sworn, the questions must be put to him, and the answers, orally given, must be reduced to writing at the time of the examination, not prior thereto. The fact that the writing is done by the witness will not vitiate the deposition. If it is written by the witness, it will be presumed that he did it in the presence of and by direction of the officer taking the deposition. *Flat v. Tank*, 737.
2. PAPER ANNEXED AS EXHIBIT TO DEPOSITION IS NOT PART OF IT within the meaning of a statute which provides that depositions "shall be written by the magistrate, or by the deponent, or by some disinterested person, in the presence and under the direction of the magistrate;" hence if such an exhibit is in the handwriting of a party to the action, it does not fall within the prohibition of that statute. *Id.*
3. UNLESS ORIGINAL INSTRUMENT IS LOST, DESTROYED, OR OTHERWISE PROPERLY ACCOUNTED FOR, a copy of it, used as an exhibit, and attached to the deposition of a witness, and as such is offered in evidence, should not be received as such by the court. If, however, the witness is a party, and the fact of partnership between himself and his co-defendant is admitted by the pleadings, and he in his deposition admits such copy to be a true copy, it may then be offered as an admission of one of the partners, concerning a partnership transaction, and such admission will bind the partnership. *Id.*
4. FAILURE TO STATE VENUE OR PLACE OF TAKING OF DEPOSITION, either in the margin of the deposition or in the certificate of the officer before whom it is taken, will not invalidate it. *Id.*

DEVISES.

See WILLS.

DOWER.

ELOPEMENT OF WIFE AND LIVING IN ADULTERY without reconciliation with the husband is no bar to a claim for dower under the law of Rhode Island. *Bryan v. Batcheller*, 454.

EASEMENTS.

1. PRESUMPTION OF GRANT OF EASEMENT arising from twenty years' enjoyment is not conclusive, but may be rebutted. *Hieatt v. Morris*, 280.
2. WHERE PARTIES CONSTRUCT WALL FOR SUPPORT OF THEIR HOUSES on the line of their respective lots, and continue to occupy the same for more than twenty-one years, under an agreement containing no express stipulation as to the continuance or termination of such joint use of the wall, one of the parties may, if he desires to remove the building upon his lot, in order to erect another thereon, notify the other of his intention to remove that portion of the wall standing upon his land, and upon the other party's refusing to suffer or permit such removal, he may proceed to take the wall down, using due and proper care to prevent injury to that part of the wall standing upon the lot of the other party without being liable in an action therefor. *Id.*

3. **UNDER PAROL AGREEMENT BY OWNERS OF ADJACENT LOTS**, dedicating an alley to the common use of the lots, and in pursuance of which the owners erect their buildings in reference to the alley, the easement becomes appurtenant to each lot, and is not defeated by the statute of frauds, and subsequent purchasers of the lots take the easement as an appurtenance. *Rhea v. Forsyth*, 441.
4. **WHERE OWNER OF TWO LOTS, UPON ONE OF WHICH IS SPRING**, and upon the other of which is a paper-mill to which for many years the water of the spring has been conducted by artificial means, conveys the spring lot without reference to the spring in the deed, either by way of grant or reservation, the grantee takes subject to the easement that the water shall continue to be so diverted. *Seymour v. Lewis*, 108.
5. **GRANTEE OF ONE OF TWO TENEMENTS OR OF PORTION OF ENTIRE ESTATE** takes it with respect to the tenement or portion retained by the grantor subjected to or benefited by all apparent and continuous easements attached to and affecting it at the time of the conveyance. *Id.*
6. **EVERY GRANT OF THING NATURALLY AND NECESSARILY IMPORTS A GRANT** of it as it actually exists, unless the contrary is provided for. *Id.*
7. **EASEMENTS ARE NOT RIGHTS DISTINCT FROM TITLE OF LAND** and annexed to the person of the owner, but they pass with the title of the land. *Id.*
See EQUIT, 2.

EJECTMENT.

See MORTGAGES, 14; STATUTE OF LIMITATIONS, 3; VENDOR AND VENDEE, 2.

ELECTIONS.

1. **VOTER'S INTENTION IS TO BE INFERRED FROM REASONABLE CONSTRUCTION OF HIS ACTS**, and is not to be ascertained by evidence of his mental purpose in depositing his ballot, or his notions of the legal effect of what it contained or omitted. *People v. Saxton*, 191.
2. **VOTER'S WRITING NAME ON BALLOT, IN CONNECTION WITH TITLE OF OFFICE**, is SUFFICIENT DESIGNATION of the name for that office, although he omits to strike out a name printed on it in connection with the same office. The writing is to prevail as the highest evidence of his intention. *Id.*

EMINENT DOMAIN.

1. **BEFORE PUBLIC CAN EXERCISE RIGHT OF EMINENT DOMAIN** against the will of an owner of property, and acquire a right of entry thereon, the value of the property to be taken must be ascertained by some legal and proper proceeding, and be paid; and if such value, thus ascertained, be not paid to or received by the owner, an adequate and safe fund must be provided, from which he may be compensated. *Powers v. Beare*, 733.
2. **IN EXERCISING RIGHT OF EMINENT DOMAIN**, the state cannot provide by law that an agent of a railroad company which desires to condemn a right of way, and two disinterested persons selected by the company, may appraise the value of the land to be taken, nor can the state authorize such company to enter upon said land upon the refusal of the owner to accept the value of it as fixed by such appraisers. Such a law is unconstitutional, because it takes property without due process of law. *Id.*
3. **PAYMENT OR DEPOSIT OF LAND DAMAGES IS CONDITION PRECEDENT** to the vesting of title in a railroad company to lands taken for their road, or of any right in them to construct their road, and if they proceed in

such construction without such payment or deposit, they are trespassers. But the owner of the land may waive this condition even by parol. *McAulay v. Western Vermont R. R. Co.*, 627.

4. **OWNER OF LAND TAKEN FOR RAILROAD CANNOT MAINTAIN TRESPASS OR EJECTMENT** therefor after the road is constructed and put in operation, upon his failure to obtain payment of his land damages, where he has acquiesced in the occupation of the land for the construction of the road without prepayment of such damages under an agreement for the future payment thereof by the company. *Id.*
5. **NOTICE TO LABORERS EMPLOYED BY CONTRACTOR ENGAGED IN CONSTRUCTING RAILROAD**, given by the owner of the land taken for the road, forbidding their working on the road until his damages were paid, is not sufficient to enable him to maintain ejectment for the land taken after the road has been built and put in operation, especially where he gives such notice on one occasion only, and for many years takes no effectual steps to stop the proceedings of the company or to enforce such payment. *Id.*
6. **WHEN RIGHT OF EMINENT DOMAIN** is exercised, the commissioners to fix the damages to a person, suffered by reason of the appropriation of his property for a public use, should be fair and impartial men, indifferently chosen between the parties, and each party should be given a fair opportunity to appear before them, and make such proofs and statements as may be proper. *Powers v. Bears*, 733.

EQUITY.

1. **EQUITY CAN PREVENT ASSERTION OF LEGAL RIGHT** against plain equitable right. *Miles v. Wise*, 461.
 2. **COURT OF EQUITY HAS POWER TO COMPEL CONVEYANCE OF LANDS IN ANOTHER STATE** by a party over whose person it has jurisdiction; and this, although it is provided by statute that actions for the recovery of real property must be tried in the county in which the subject of the action is situated. *Gardner v. Ogden*, 192.
 3. **COURTS OF EQUITY WILL NOT USUALLY EXERCISE JURISDICTION** over cases of private nuisance or disturbance of easements, where the complainant's rights are disputed, until he has established his claim in an action at law. *Rhea v. Forsyth*, 441.
- See **AGENCY**, 5; **CREDITORS' BILLS**; **INJUNCTIONS**; **JURISDICTION**, 6; **LIS PENDENS**; **MECHANICS' LIENS**, 7-10; **MISTAKE**; **VENDOR AND VENDEE**; **WILLS**, 8-11.

ESTATES.

1. **DISTINCTION BETWEEN JOINT TENANCY, TENANCY IN COMMON, AND ESTATE IN COPARTNERY**, has been abolished in Texas, and the tenants are there treated all alike, simply as "part owners," and are all alike entitled to compulsory partition, and the rights of all are preserved upon any previous warranty of the title under which the tenants hold. *Ross v. Armstrong*, 574.
2. **WHERE TERMS OF BEQUEST OF PERSONALTY** are such as would in devise of realty create an estate-tail in the devisee, it operates as an absolute gift of the personalty, and a bequest over on the failure of issue of the first taker is void. *Cleveland v. Havens*, 90.
3. **ESTATE VESTS ABSOLUTELY IN FIRST TAKER**, when a gift is to him and his issue, or to him and the heirs of his body, and the limitation over is upon an indefinite failure of issue. *Id.*

4. **FIRST LEGATEE TAKES ESTATE FOR LIFE ONLY, AND LIMITATION OVER IS GOOD** when the limitation over is upon a definite failure of issue, and it is immaterial whether the gift be of the subject itself or only of the use. *Id.*
5. **COURT WILL NOT DECREE THAT LEGACY WITH LIMITATION OVER VESTS ABSOLUTELY IN FIRST LEGATEE** upon a bill by such legatee to obtain a construction of the bequest in which the executor is made defendant, merely because the executor consents to such decree, and though the real parties in interest, who take under the limitation over, and who are also made parties defendant, fail to appear and make defense, the court will not decree against them contrary to the clear right of the case. *Id.*

See RESTRAINTS ON ALIENATION, WILLS, 12-15.

ESTATES OF DECEDENTS.

1. **PURCHASER OF EQUITABLE RIGHT** from the distributees of a decedent, whose estate is free from debts, and upon which no administration has been had, will, in equity, be protected against an administrator afterwards taking out letters, and seeking to recover in an action of trover. *Miles v. Wise*, 461.
2. **UNDER RHODE ISLAND STATUTE, CHILD BORN** after the execution of his parent's will, and not provided for therein, shall inherit in the same manner as if no will had been made, and parol evidence of the intent of the parent at the time of executing the will is not admissible to defeat the child. *Chace v. Chace*, 446.
3. **SALE OF REAL ESTATE ON CREDIT WORKS EQUITABLE CONVERSION THEREOF** into personality for the purposes of succession. If it is recovered back by the widow and heirs of the owner after his death, under a clause of forfeiture in the contract of sale, its status is not changed, and it is to be distributed to the heirs of the deceased owner as personal property, and in the proportion that personality would be distributed to them. *Leiper's Appeal*, 347.

See EXECUTORS AND ADMINISTRATORS.

ESTATES FOR LIFE.

See ESTATES, 4.

ESTATES-TAIL.

See ESTATES, 2; WILLS, 4.

ESTOPPEL.

ESTOPPELS ARE SUSTAINED TO EXCLUDE TRUTH, because a man's own acts clothe up his mouth to allege the truth. No man should allege anything in his defense but the truth, and what he once alleges he ought not afterwards to dispute. *Waters's Appeal*, 354.

See BUILDING ASSOCIATIONS, 2; VENDOR AND VENDEE, 9, 11.

EVIDENCE.

1. **EVIDENCE TO CONTRADICT IRRELEVANT TESTIMONY** may be properly rejected. *Schenley v. Commonwealth*, 359.
2. **DECLARATIONS OF PERSON TENDING TO SHOW THAT HE HAD KNOWLEDGE OF CERTAIN FACTS** are admissible in evidence for the purpose of proving

that he had such knowledge when he made them. *McAulay v. Western Vermont R. R. Co.*, 627.

See CRIMINAL LAW; DEPOSITIONS; EXPERTS; INSTRUCTIONS; NEGLIGENCE, 2-8; NEGOTIABLE INSTRUMENTS, 9; SALES, 4-7; SHERIFFS, 6; WILLS, 2-11.

EXCAVATIONS.

See NEGLIGENCE, 13

EXECUTIONS.

1. WHEN SHERIFF HAS TWO EXECUTIONS IN HIS HANDS against the same defendant, at the same time, he is bound to apply any levy he makes, whether of goods or money, to that writ which first came into his hands, giving the second the benefit of any surplus that may remain after satisfaction of the first. *Rudy v. Commonwealth*, 330.
2. MINISTERIAL OFFICERS, SUCH AS SHERIFF OR CONSTABLE, CANNOT BUY AT HIS OWN EXECUTION SALE, either directly or indirectly, either by himself or an agent, for himself or another. The fact that the sale is conducted by another officer, in concert and joint interest with the officer buying, does not alter the case. The sale passes no property. *Robinson v. Clark*, 265.
3. STATUTE IN PENNSYLVANIA GIVES SHERIFF POWER TO SEIZE AND TAKE MONEY IN EXECUTION only "when he can find no other real or personal estate of the defendant," and even then, he is not to take the money from the person of the defendant. Under such a statute, if a person delivers money to a sheriff who holds two executions against said person, with a direction to apply it upon the execution last received by the sheriff, it must be so applied, and the prior execution creditor has no right to have it applied on his prior execution. If, ordinarily, the sheriff could seize money thus placed in his hands and apply it to the prior execution, he could not do so while he had real estate levied upon by virtue of such prior execution and undisposed of in his hands. *Rudy v. Commonwealth*, 330.
4. EXEMPTION IN SHERIFF'S DEED OF LAND CONVEYED BY ONE PERSON TO ANOTHER covers land conveyed to the latter by the former's grantee. *Bartlett v. Judd*, 131.
5. SHERIFF'S DEED MAY BE REFORMED TO ACCORD WITH FACTS, where admissible evidence shows that its recitals are wrong and should be corrected. *Id.*
6. PAROL EVIDENCE IS ADMISSIBLE TO SHOW THAT SHERIFF EXPRESSLY EXCEPTED CERTAIN LAND from the sale of a larger tract made by him under execution, in an action of ejectment brought by the purchaser at such sale. *Id.*
7. STRANGER PURCHASING BONA FIDE AT SALE UNDER EXECUTION OF LANDS OR GOODS takes a title unaffected by the subsequent reversal of the judgment. *Stroed v. Casey*, 556.
8. PLAINTIFF IN EXECUTION, AND ATTORNEY WHO RECOVERED JUDGMENT, ARE DEEMED TO BE PURCHASERS WITH NOTICE of all errors and irregularities in the proceedings and judgment in the suit; and where plaintiff bought land at sheriff's sale on execution, under judgment in his favor, and conveyed it to the attorneys who obtained the judgment, and the judgment was afterwards reversed by the supreme court for error therein, such reversal was held to put an end to the title so acquired. *Id.*

9. PARTY CANNOT MOVE SECOND TIME, AND ON OTHER GROUNDS, TO SET ASIDE SALE ON EXECUTION after a reversal on appeal of an order granting a former motion, unless at the time of the reversal he obtains leave from the appellate court to renew the motion. *Cornish v. State Bank*, 719.
 10. IF PROPERTY OF EXECUTION DEBTOR, SOLD AT SHERIFF'S SALE, is recovered by him from the purchaser on the ground of its exemption from execution as a homestead, the purchaser may recover back his money from the execution debtor. *Stone v. Darnell*, 582.
 11. PURCHASER FROM WHOM PROPERTY BOUGHT AT EXECUTION SALE IS RECOVERED, because it is exempt as a homestead, though he might have pleaded his right in reconvention in the ejectment suit, is not precluded because he failed so to do from recovering the money paid by him. *Id.*
 12. MEASURE OF DAMAGES IN ACTION AGAINST EXECUTION DEBTOR to recover back money paid at a sheriff's sale for the purchase of certain property, where the execution debtor has recovered the property in another action from the purchaser, because as a homestead it was exempt from execution, is the amount of the purchase-money paid to the use of defendant, and interest. *Id.*
- See EXEMPTIONS; MECHANICS' LIENS, 6; NOTICE, 2; STATUTE OF LIMITATIONS, 3.

EXECUTORS AND ADMINISTRATORS.

1. PRESUMPTION EXISTS THAT ASSETS OF DECEDENT WERE HELD BY ONE UNTIL HIS APPOINTMENT AS ADMINISTRATOR, where he received them under an agreement to take out letters of administration; and therefore, in the absence of evidence to the contrary, the liability of the sureties on his administration bond attached. *People v. Hascall*, 176.
2. EVIDENCE IS INADMISSIBLE OF ADMINISTRATOR'S INSOLVENT CONDITION AND CONVERSION OF OTHER TRUST FUNDS at and immediately before his appointment, in an action against the sureties on his administration bond, to show his conversion, prior to that time, of assets of the decedent, received by him under an agreement to take out letters of administration. *Id.*
3. ESTATE OF DECEDENT MAY BE HELD RESPONSIBLE, ON PRINCIPLES OF EQUITY, to third person with whom the administrator has created debts properly chargeable against the estate; but to hold the estate so responsible, such third person has the burden to prove that it was a reasonable expense incurred for the benefit of the estate, in the same manner as would be required of the administrator, had he incurred the expense and presented his claim for allowance by the chief justice. *Price v. McIver*, 558.
4. EXECUTOR OR ADMINISTRATOR HAS AUTHORITY TO JUDGE, IN FIRST INSTANCE, of propriety of incurring expense on account of estate; and if he disallow the claim, it necessarily involves litigation between him and the claimant, and the probate court is not the appropriate forum for conducting such litigation. *Id.*
5. GIVING OF NOTE BY EXECUTOR OR ADMINISTRATOR PAYABLE TO THIRD PERSON, in consideration of services to be rendered estate, does not bind the estate, nor preclude any defense the executor or administrator may have had to the note when presented for payment. The giving of the note is not the allowance of the plaintiff's claim. *Id.*

6. CLAIM CONTESTED BY EXECUTOR OR ADMINISTRATOR MUST BE ESTABLISHED BY SUIT, if at all, and the probate court cannot properly take cognizance of the case. *Id.*
7. STRANGER CANNOT TAKE ADVANTAGE OF MERE IRREGULARITIES in service of notice of administrator's sale, to defeat the purchaser's title. *Overton v. Crawford*, 244.
8. PURCHASER AT ADMINISTRATOR'S SALE WILL BE PROTECTED where the warrant for selling is regular on its face, and issues from a court of competent jurisdiction. *Id.*
9. IT IS IRREGULAR FOR ADMINISTRATOR, WHO IS ALSO SHERIFF, TO SERVE NOTICE of sale of estate on the heirs, but such irregularity cannot be inquired into collaterally, and the court may correct it. *Id.*
10. EXECUTORS ARE ENTITLED TO THEIR COSTS where they have merely sought for their security to have the construction of the will settled. *Craft v. Snook's Ex'rs*, 94.

EXEMPTIONS.

DEBTOR CANNOT, WHEN CONTRACTING DEBT, AGREE THAT EXEMPT PROPERTY MAY BE TAKEN ON EXECUTION, in case of non-payment. *Kneetle v. Newcomb*, 186.

EXPERTS.

EXPERT TESTIMONY IS OF NO WEIGHT when the witnesses, whose opinions are taken, have no learning in the scientific principles of which they speak. *Carr v. Northern Liberties*, 342.

FENCES.

See ANIMALS; MECHANICS' LIENS, 2.

FORGERY.

See CRIMINAL LAW, 15, 16.

FRAUDULENT TRANSFERS.

See DEBTOR AND CREDITOR.

GAMING.

See WAGERS.

GUARANTY.

See SURETYSHIP; WARRANTY.

HIGHWAYS.

1. DEDICATION OF LAND FOR PUBLIC HIGHWAY MAY BE PRESUMED AGAINST MARRIED WOMAN from the fact of its long-continued use as such by the public during the continuance of a lease of the premises to her, and her failure to resume her rights as a reversioner for four or five years after the expiration of the lease, and until after the street has been graded and paved. Twenty-one years' adverse enjoyment is not necessary to perfect the presumption. *Schenley v. Commonwealth*, 359.
 2. MARRIED WOMAN MAY DEDICATE HER LAND FOR PUBLIC HIGHWAY. *Id.*
 3. LIABILITY OF LOT FOR STREET GRADING AND PAVING IS THE EXPENSE to the city, whether the work was done by contract or not. *Id.*
 4. MUNICIPAL CLAIM FOR STREET GRADING AND PAVING IS DUE ON DEMAND and bears interest from the date of demand. *Id.*
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6. POWER TO PAVE SIDEWALK INCLUDES POWER to furnish all that is necessary or usual and fit for paving. *Id.*
6. WHETHER CURB-STONES ARE CUSTOMARY FOR SIDEWALKS IS QUESTION FOR JURY, not the court. *Id.*
7. ASSESSMENT OF PROPERTY FOR STREET GRADING MAY BE MADE UPON EACH FRONTAGE FOOT EQUALLY; and where one person owns several blocks, they need not all be grouped together in one assessment. A joint assessment on separate and distinct pieces of property is not required. *Id.*
8. LOT-OWNERS ARE LIABLE TO CITY FOR STREET GRADING, AND ARE NOT AFFECTED by the agreement between the city and the contractors. *Id.*
9. STATEMENT OF MUNICIPAL CLAIM FOR PAVING AND GRADING STREET NEED NOT SET OUT the nature, quality, and amount of work done, with the dates and prices thereof, under the act of March 30, 1852. *Id.*
10. MUNICIPAL CLAIM MAY BE FILED WHEN.—Municipal claim for grading and paving street, and made against owner of adjoining land, may be filed any time after demand; and remains a lien on the land until paid, under the acts of April 5, 1849, and April 8, 1851. *Id.*

See NEGLIGENCE, 13.

HOMESTEADS.

1. LEASED LOT IS USED AS HOMESTEAD by a married man, he being the owner of the building in which he resides with his family, he has power to assign the lease, and sell the house, and give a bill of sale therefor without his wife joining in the transaction. Such a transaction does not come within the disability imposed on the husband by the homestead laws of Wisconsin. *Platto v. Cady*, 752.

See EXECTIONS, 10-12.

HUSBAND AND WIFE.

1. HUSBAND, BY IMPROVING HIS WIFE'S LAND WITHOUT ANY AGREEMENT WITH HER, through trustees or otherwise, that his labor and money expended thereon should vest in him any interest therein, or entitle him to any claim against or compensation from her property, gains no right or title to her land which his creditors can reach by attachment, or by the aid of a court of equity. *Webster v. Hildreth and Wife*, 632.
2. DELIVERY BY HUSBAND OF DEED REGULARLY EXEOUTED AND ACKNOWLEDGED by himself and wife, and acceptance by the grantee, in good faith, bind the wife, although such delivery was made by the husband without the knowledge of the wife. *Baldwin v. Snowden*, 303.
3. FAILURE OF HUSBAND TO DISCLOSE TO WIFE CHARACTER OF MORTGAGE executed by her at his request, she being ignorant of its contents, is not such fraud as will enable her to contradict, by parol, the certificate of acknowledgment, the grantee being absent, and having no notice of any imposition. *Id.*

See ACKNOWLEDGMENTS; DOWER; HOMESTEADS; MARRIED WOMEN.

INDICTMENTS.

See CRIMINAL LAW, 1, 9.

INFANCY.

1. INFANT MAY MAKE SOME CONTRACTS WITH THIRD PERSONS, which will be binding until avoided by him, or until the parent asserts his paramount

authority to put an end to the contract by reclaiming the services of his minor child. A contract for the infant's benefit is one of this kind. *Nashville etc. R. R. Co. v. Elliott*, 506.

2. INFANT'S CONTRACT TO SERVE RAILROAD COMPANY AS EMPLOYEE IS VALID, as between himself and the company; and want of the previous consent of the parent does not avoid it. It remains good until either the parent or his minor child puts an end to it. *Id.*

INJUNCTIONS.

1. COURTS IN GRANTING INJUNCTIONS ARE NOT RESTRICTED TO ACTS "CONTRARY TO LAW," but may also, at times, exercise this power to restrain acts contrary to equity. *Stockdale v. Ullery*, 440.
2. COURT WILL INTERFERE BY INJUNCTION TO RESTRAIN PARTNER, holding notes for the benefit of the firm, from pawning or pledging them for his own private debts, as it is an act contrary to law, and a fraud on his partners. *Id.*
3. INJUNCTION IS PROPER REMEDY to prevent the exercise of a power granted by a law in contravention of the provisions of the constitution. *Powers v. Beare*, 783.
4. TO EFFECT REGULAR SERVICE OF INJUNCTION, writ itself under seal of court must be shown to the party against whom it issues, and a true copy thereof delivered to him. *Haring v. Kaufman*, 102.
5. PERSONAL SERVICE OF INJUNCTION WILL BE DISPENSED WITH where the party is out of the state or cannot be found. *Id.*
6. MODERN PRACTICE IS FOR COURT BY SPECIAL ORDER TO DISPENSE WITH PERSONAL SERVICE of injunction, where the defendant avoids the service of the writ, or other circumstances render such order necessary or proper. *Id.*
7. COURT MAY PUNISH VIOLATION OF ITS ORDER THOUGH INJUNCTION BE NOT SERVED, if it appears that the defendant knew of its existence. *Id.*
8. ORDER WILL BE MADE DECLARING SERVICE OF INJUNCTION VALID where defendant has been legally served with subpoena and a copy of the injunction has been left at his dwelling-house, and it appears from affidavits that he is endeavoring to avoid service of the injunction. *Id.*
9. ORDER DECLARING SERVICE OF INJUNCTION VALID WILL BE MADE where defendant and his wife are non-residents, and the writ was served out of the state upon the defendant personally, and it is shown by affidavits that the wife, after diligent search, could not be found; even though the defendant has not been previously brought within the jurisdiction of the court by service of subpoena or otherwise. *Id.*
10. COPY OF ORDER DECLARING SERVICE OF INJUNCTIONS VALID SHOULD BE SERVED upon the defendants, either personally or by leaving it at the dwelling-house of each of them. *Id.*

See NUISANCE; VENDOR AND VENDEE, 2, 4.

INSOLVENCY.

ASSIGNEES IN INSOLVENCY OF NON-NEGOTIABLE CHOSES IN ACTION CANNOT MAINTAIN ACTIONS THEREON in their own names in another state, although expressly empowered to do so by the laws of the state where they were appointed. *Fisk v. Brackett*, 612.

See ASSIGNMENTS FOR BENEFIT OF CREDITORS.

INSTRUCTIONS.

1. IT IS NOT ERROR if the court adds to its instruction to a jury, "much is left, and much must always be left, to your sound discretion," if otherwise the instructions are without error. It is better, however, not to add such words. *Pennsylvania R. R. Co. v. Ogier*, 322.
2. GENERAL EXCEPTION TO INSTRUCTION IS NOT SUFFICIENT TO REVERSE JUDGMENT FOR ERRONEOUS CHARGE, unless it be entirely erroneous. *Milwaukee and Chicago R. R. Co. v. Hunter*, 699.
3. IF SPECIFIC INSTRUCTIONS TO JURY ARE DESIRED by a party to the action, it is the duty of that party to request the court to give such instruction. *Borngeesser v. Harrison*, 757.
4. THAT COURT IN CHARGING JURY EXPRESSED DOUBTS AS TO LEGAL EFFECT which certain evidence might have had in a supposed contingency, and which was not in the case as presented to the jury, is no cause for reversal or writ of error. *Girard Fire etc. Ins. Co. v. Stephenson*, 423.

INSURANCE.

1. INSURANCE IS CONTRACT OF INDEMNITY, IN WHICH PARTIES MAY STIPULATE for the manner and time in which that indemnity shall be made and valued; and where such is the case, the law will carry out their contract. *Commonwealth Ins. Co. v. Bennett, Barr, & Co.*, 418.
2. MEASURE OF DAMAGES ON OPEN POLICY OF INSURANCE, specifying that damages are to be estimated at the "true and actual cash value of the property at the time the loss may happen," is that which was agreed upon by the parties, and it is error to allow the jury to adopt any other rule. *Id.*
3. RESERVATION BY INSURERS IN POLICY OF PRIVILEGE TO REPAIR OR REPLACE the property destroyed is merely a privilege for their benefit, which they may adopt or not as they think proper, and therefore the expense of repairing or replacing the property is not a proper rule for estimating the damages, on a contract to measure the damages by the value of the property when the loss occurs. *Id.*
4. FACT THAT PROPERTY DESTROYED WAS PATENTED cannot affect a contract to measure the damages by the value of the property at the time when the loss occurred. *Id.*
5. IN APPLICATION FOR INSURANCE, WHERE NEIGHBORING BUILDINGS, one of which was a carpenter-shop, were properly located and described, and the purposes for which they were used stated, in response to inquiries, it was neither a fraudulent concealment of material facts, nor a breach of the covenants of the assured, to omit to state that such carpenter-shop was heated by stoves, or to say what provision was made for warming, unless, perhaps, the heating was effected in an unusual and extraordinary manner. *Girard Fire etc. Ins. Co. v. Stephenson*, 423.
6. IN ACTION ON INSURANCE POLICY TO RECOVER FOR LOSS BY FIRE, which originated in an adjoining carpenter-shop, the location of which was properly given in the application for insurance, it is not error to permit the jury to decide whether stoves are necessary and customary in a carpenter-shop, when coupled with the instruction that if not necessary and customary plaintiff could not recover; nor is it error to permit the jury to decide whether the placing of a steam-engine in the shop, by which the stoves were superseded, had increased the hazard over what it would have been from the stove alone, with the instruction that if it had

done so, and the loss was the result of the change, the plaintiff must fail, but if not, the loss must fall upon the company, even though the fire may have originated from the engine. *Id.*

7. UNDER INSURANCE POLICY PROVIDING THAT ALTERATIONS OR REPAIRS made in and about the insured premises must be at the risk of the party insured, such repairs or alterations do not *per se* avoid the contract, but only place upon the insured party the hazard of their increasing the liability of the insurer. *Id.*
8. "FORTHWITH" MEANS IMMEDIATELY IN ALL INSURANCE POLICIES REQUIRING the assured to give notice of loss forthwith; and notice twenty days after is not a compliance with the requirement. *Whitchurst v. N. Carolina Mut. Ins. Co.*, 248.

INTEREST.

1. COMPOUND INTEREST IS NOT USURY. *Hale v. Hale*, 490.
2. COMPUTATION OF INTEREST UPON INTEREST, TURNED INTO PRINCIPAL, does not increase the rate of interest upon the amount of the original loan, and does not constitute usury. *Id.*
3. COMPOUND INTEREST MAY BE AGREED UPON. Parties to a loan may lawfully agree, when it is made, that if the interest is not paid at the time stipulated, it shall be treated as principal, and bear interest. *Id.*
4. WHEN PAYMENT OF INTEREST AT STATED PERIODS FORMS PART OF CONTRACT, and the payment of the principal sum is postponed to a distant day, upon faith that the interest will be punctually and regularly paid at the times agreed upon, interest may be recovered upon interest from the time it falls due. *Id.*
5. AFTER INTEREST BECOMES DUE, it may, by agreement, be turned into principal and bear interest. *Id.*
6. INTEREST ON CONTRACT, made in one county and to be performed in another, will be computed according to the law of the latter. *Roberts v. McNeely*, 261.
7. NOTE GIVEN FOR MERCHANDISE IS NOT USURIOUS, where it is made in one state and payable in another, if the rate of interest does not exceed the lawful rate of the latter state. *Id.*
8. EXISTENCE OF CORRUPT AND UNLAWFUL INTENT ON PART OF LENDER TO TAKE ILLEGAL INTEREST is essential in order to make a transaction usurious. *Condit v. Baldwin*, 137.
9. WHERE AGENT TRUSTED WITH MONEY TO INVEST AT LEGAL INTEREST exacts, without the knowledge or authority of his principal, a bonus for himself, as the condition of making a loan, this will not constitute usury in the principal or affect the security in his hands. *Id.*
10. BANK LIMITED TO TAKING TEN PER CENT INTEREST ON LOANS may discount a note at twelve per cent, without rendering the contract void. *Rock River Bank v. Sherwood*, 669.
11. WHEN BANK RESERVES GREATER INTEREST THAN CHARTER ALLOWS, the usury laws apply to the contract, although the rate does not exceed the rate prescribed by such usury law. *Id.*
12. INTEREST ON USURIOUS CONTRACT MAY BE RECOVERED, unless the party affected by the usury sets up the usury in his answer, and tenders the principal sum. *Id.*

See CO-TENANCY, 4; MECHANICS' LIENS, 4, 5; WARRANTY, 14; WILLS, 18.

JOINT TENANCY.

See ESTATES, 1.

JUDGMENTS.

1. WHERE ALL OF SEVERAL COUNTS ARE GOOD, JUDGMENT MAY BE ENTERED ON ALL OF THEM, though the evidence is applicable only to some of them. It does not hurt the defendant. *Kiescker v. Moss*, 379.
2. WHEN CASE INVOLVING TWO OR MORE ISSUES IS SUBMITTED TO JURY, with evidence tending to sustain them all, and a general verdict is rendered, such verdict is *prima facie* evidence that all the issues were found in favor of the party for whom it is rendered; and when a judgment on such a verdict is presented by him to defeat a recovery in a subsequent suit brought on the same cause of action, the burden of proving that the verdict in the first suit was rendered upon an issue presenting only a temporary bar, and that such bar has been since removed, or has ceased to operate, is thrown upon the plaintiff. If a party against whom such a verdict is rendered would avoid this effect of a general verdict, he must see to it that the jury by their verdict declare upon what issue it is rendered. *White v. Simonds, Conant, & Co.*, 620.
3. UNDER CODE OF TENNESSEE, PARTY AGAINST WHOM JUDGMENT ON DEMURRER IS RENDERED MAY PLEAD OVER AS MATTER OF RIGHT, without waiving the benefits secured by his demurrer. Therefore the proper judgment against him is *respondent ouster*; and if he fails to plead over, a writ of inquiry, if necessary to ascertain the damages, will issue immediately, and be executed the same term. If the demurrer is without cause, terms may be imposed, not to exceed the costs of the action. And if the judgment or decree of the inferior court is reversed, the appellate court is required to give such judgment or make such decree as should have been rendered below, and to issue execution without a *procedendo*, except where the damages to be assessed are uncertain, in which case the cause must be remanded for further proceedings: See Code of Tenn. 1858, secs. 2396, 2397, 2398, 3167. *Williamson v. Smith and Walker*, 478.
4. WHERE JUDGMENT IS PRIMA FACIE BAR, AND NO EVIDENCE IS OFFERED to remove such bar, it is just as conclusive as a matter of fact as though it was absolutely conclusive as a matter of law. *White v. Simonds, Conant, & Co.*, 620.
5. JUDGMENT CANNOT BE AVOIDED OR IMPRACHED BY ATTACKING MERE IRREGULARITIES in judicial proceedings, which are open to direct objection in the suit, or which may be taken advantage of on error or appeal. *Nash v. Church*, 678.

See ACCOUNT, 1, 2; PARTITION, 2.

JUDICIAL NOTICE.

See STATUTES, 3.

JUDICIAL SALES.

See EXECUTIONS; EXECUTORS AND ADMINISTRATORS, 7-8.

JURISDICTION.

1. ORPHANS' COURT IS ONE OF LIMITED POWERS; and though it is a court of equity, it has no jurisdiction except what is conferred upon it by statute. *Snyder's Appeal*, 372.
2. IT IS ONLY IN CERTAIN CASES OF JOINT TENURE THAT ORPHANS' COURT IS AUTHORIZED TO MAKE PARTITION, and these cases are defined by statute. *Id.*

3. JURISDICTION OF ORPHANS' COURT IN PARTITION is limited by statute to the partition of a single estate. *Id.*
4. JURISDICTION OF ORPHANS' COURT TO MAKE PARTITION OPERATES ON TITLE OF DECEDENT only, and not upon that of the heirs. It is because it is the land of a decedent, and not because it is the land of heirs, that this court is empowered to make partition. *Id.*
5. ORPHANS' COURT HAS NO JURISDICTION TO DEOREN PARTITION ON ONE PROCEEDING OF TWO ESTATES held in common by the same parties, and as the heirs of two different persons. *Id.*
6. SUPREME COURT OF NEW YORK SUCCEEDED TO JURISDICTION OF COURT OF CHANCERY, under the constitution of 1846. *Gardner v. Ogden*, 192.
7. COURT HAVING EXCLUSIVE JURISDICTION OVER MUNICIPAL CLAIM MAY ISSUE WRIT OF SCIRE FACIAS, notwithstanding the claim has been filed in another court, and not yet removed to the court having jurisdiction. *Schenley v. Commonwealth*, 359.

See EQUITY.

LANDLORD AND TENANT.

1. LESSOR IS NOT LIABLE IN DAMAGES FOR ACCIDENTAL LOSS OF DEMISED PREMISES BY FIRE, under a covenant to redeliver them at the expiration of his term in as good order as when received, usual wear and tear and unavoidable accidents excepted. *Howeth v. Anderson*, 533.
2. CONTRACT OF LEASE IS NOT LIKE CONTRACT OF COMMON CARRIER, and is not governed in its construction, to the same extent, by considerations of public policy. *Id.*
3. LEASES ARE CONSTRUED LIKE OTHER WRITTEN AGREEMENTS, so as to give effect to the intention, and in arriving at the intention, the subject-matter, the situation of the parties, and the object had in view and intended to be accomplished by the parties at the time are to be regarded. *Id.*
4. THERE IS IMPLIED PROMISE TO PAY for improvements, where a son, who is the tenant from year to year of his father's estate, expressly refuses to proceed with the improvements till he has his father's promise that the farm shall be his upon his father's death, and the father does not keep his promise. *Smith v. Adm'r of Smith*, 49.

See HOMESTEADS; VENDOR AND VENDEE, 5-8.

LARCENY.

See CRIMINAL LAW, 2-5.

LATERAL SUPPORT.

See EASEMENTS, 2.

LEGACIES.

See ESTATES, 2-5; WILLS.

LIBEL.

LIBEL—FULL, FAIR, AND IMPARTIAL REPORT OF JUDICIAL TRIAL, had in open court, unaccompanied by malicious and defamatory comments, may be published with impunity, and is considered as privileged. But such privilege does not extend to the publication of mere preliminary proceed-

ings, such as an *ex parte* affidavit, made before a proper officer, with a view to the arrest of the party. Such publication can only be justified by proving the truth of the charge. *Cincinnati Gazette Co. v. Timberlake*, 286.

LICENSES.

See **TAXATION**, 1; **TRESPASS**, 1, 2.

LIENS.

See **MECHANICS' LIENS**.

LIFE ESTATES.

See **ESTATES**, 4.

LIQUOR LAWS.

See **TAXATION**, 1.

LIS PENDENS.

1. **LIS PENDENS IN EQUITY, NOT COLLUSIVE, AND DULY PROSECUTED**, is NOTICE to a purchaser so as to affect and bind his interest by the decree, and begins from the service of the subpoena after the bill is filed; and is no more than the adoption of the common-law rule in real actions, that if the defendant aliens after the pendency of the writ, the judgment will overreach the alienation. *Diamond v. Lawrence County*, 429.
2. **DOCTRINE OF LIS PENDENS IS NOT CONFINED TO REAL ACTIONS**, but is applicable to choses in action, other than commercial paper which has not matured. *Id.*
3. **PENDENCY OF SUIT BETWEEN COUNTY AND RAILROAD COMPANY**, in regard to bonds issued by the county, in payment of its subscription to the company's stock, is notice to all the world of the facts alleged in the pleadings therein, and the purchasers of such bonds from the company *pendente lite*, and all subsequent purchasers, are affected by the decree of the court in the suit pending at the time of the purchase. *Id.*

MALICE.

See **CRIMINAL LAW**, 10-13; **TELEGRAPHS**, 5.

MARRIED WOMEN.

1. **MARRIED WOMAN'S SEPARATE ESTATE IS NOT CHARGEABLE WITH HER DEBTS**, unless her intention to make it so is indicated in the contract itself, or the debt is contracted for the direct benefit of the separate estate. *Yale v. Dederer*, 216.
2. **MARRIED WOMAN'S SEPARATE ESTATE IS NOT CHARGEABLE ON PROMISSORY NOTE** signed by her as surety for her husband, although she intended thereby to charge her estate. *Id.*

See **ACKNOWLEDGMENTS**; **HIGHWAYS**, 1, 2.

MASTER AND SERVANT.

WHERE SEVERAL SERVANTS ARE EMPLOYED IN COMMON SERVICE, and one of them suffers an injury by the neglect or want of care of another, while they are jointly engaged in the same service, he cannot recover against

the employer for such injury, in the absence of any fault on the latter's part. *Nashville etc. R. R. Co. v. Elliott*, 506.

See RAILROADS.

MECHANICS' LIENS.

1. RAILROAD BRIDGE IS NOT BUILDING WITHIN STATUTE GIVING MECHANIC'S LIEN upon "any dwelling-house or other building." *La Crosse and Milwaukee R. R. Co. v. Vanderpool*, 691.
2. WORD "BUILDING" INCLUDES THOSE STRUCTURES ONLY WHICH HAVE CAPACITY TO CONTAIN and are designed for the habitation of man or animals, or the sheltering of property. *Id.*
3. PARTY IS ENTITLED TO MECHANIC'S LIEN FOR BUILDING FENCE, under a statute providing that "any person performing manual labor upon any land, timber, or lumber" shall be entitled to a lien thereon. This act was designed to include at least all labor done directly upon the land for the purpose of preparing it for use as such. *Bailey v. Hull*, 706.
4. MECHANIC'S LIEN IS NOT WAIVED BY TAKING NOTE which does not extend the credit beyond the time in which the party is required to sue to maintain his lien. *Id.*
5. ONE HAVING MECHANIC'S LIEN ON LAND MAY FIX RATE OF INTEREST to be recovered on the debt by taking a note for the debt fixing the rate of interest. *Id.*
6. JUDGMENT RENDERED IN ENFORCEMENT OF MECHANIC'S LIEN MAY, under Wisconsin statute, order the sale of the property to be made under execution as ordinarily. *Id.*
7. WHERE MECHANIC'S LIENS ARE ENTERED AGAINST EQUITABLE ESTATE, their value depends upon that estate, and they survive or perish with it. *Campbell and Pharo's Appeal*, 375.
8. MORTGAGE UPON LEGAL ESTATE FOR PURCHASE-MONEY IS ENTITLED TO PRIORITY OVER MECHANIC'S LIEN against the equitable estate of the vendee under a contract of sale, although by agreement between the vendor and vendee a third person takes the title and gives the mortgage to one who advances the purchase-money. *Id.*
9. UNION OF LEGAL AND EQUITABLE ESTATE, so as to give a priority to the liens on the latter, never takes place against the intention of the parties, where that intention is manifested. *Id.*
10. MERGER INSUFFICIENT TO LET IN MECHANIC'S CLAIMS AGAINST EQUITABLE ESTATE OF VENDOR.—Where the vendee under a contract of sale fails to pay the purchase-money, and the vendor and vendee agree that a third person shall take the title and give a mortgage to one who advances the purchase-money, and the deed and mortgage are executed simultaneously, it is not such a merger or extinguishment as will let in mechanics' claims against the equitable estate of the original vendee. *Id.*

MERGER.

See MECHANIC'S LIENS, 10.

MINES AND MINING.

OWNERSHIP OF MINES, WHETHER OPENED OR UNOPENED, MAY EXIST distinct from the ownership of the surface, under a proper deed therefor. *Caldwell v. Copeland*, 436.

2. POSSESSION OF SURFACE OF LAND FOR MORE THAN TWENTY-ONE YEARS does not carry with it the possession of minerals below it, where the title to the latter had been severed from that of the surface by deed. *Id.*
3. TITLE TO MINES OR MINERALS, DISTINCT FROM TITLE TO SURFACE OF land, may be shown by documentary evidence, or in the absence thereof or in opposition thereto, by proof of possession and acts of ownership under the statute of limitations. *Id.*
4. OWNER OF SURFACE OF LAND SEEKING TO ESTABLISH TITLE TO MINE, by adverse possession under the statute, in opposition to a deed, must prove possession of the mine as such, independently of his possession of the surface. *Id.*

See STATUTE OF LIMITATIONS 1

MISTAKE.

1. MISTAKE IN ATTEMPTED DESCRIPTION OF MORTGAGED PREMISES, in a mortgage of land, which has been duly executed and recorded, will be corrected in equity, not only as against the mortgagor, but also as against judgment or attaching creditors of the mortgagor and purchasers under them with notice of the mistake. *Strange v. Beach*, 308.
2. IT IS GENERAL RULE IN EQUITY THAT ACT DONE OR CONTRACT MADE under mistake or ignorance of material fact is voidable and relievable against in equity, when such mistake or ignorance constitutes a material ingredient in the contract, or the motive of the act done by the parties, and disappoints their intention by a mutual error. *Ross v. Armstrong*, 574.

See WILLS, 8-11.

MORTGAGES.

1. MORTGAGE IS NOT CONVEYANCE OF LAND, BUT INCIDENT OF DEBT SECURED, and is regarded as personalty. *Blunt v. Walker*, 709.
2. EXECUTION AND CONTENTS OF WRITTEN INSTRUMENT, set forth in plaintiff's petition and relied on as a mortgage, cannot be proved by oral testimony tending to show that defendant had stated that he had executed to plaintiff a mortgage. *Williams v. Durst*, 548.
3. SECONDARY EVIDENCE OF CONTENTS OF MORTGAGE WILL NOT SUPPORT VERDICT AND JUDGMENT OF FORECLOSURE where such evidence fails to connect the mortgage with the debt it was alleged to have been given to secure, or to show upon what account or to secure what debt it was given. *Id.*
4. GRANTEE WHO COVENANTS WITH GRANTOR TO PAY OFF MORTGAGE ON PREMISES becomes in equity the principal debtor with respect to the mortgage debt, and the grantor becomes his surety. *Klapsorth v. Dressler*, 69.
5. GRANTEE DOES NOT BECOME PERSONALLY LIABLE FOR PAYMENT OF MORTGAGE DEBTS, by accepting a deed containing full covenants, reciting a consideration of twelve thousand dollars, and declaring in the *habendum* clause that the conveyance is subject to four mortgages, "which said four mortgages, amounting in the aggregate to the sum of eight thousand five hundred dollars, has been estimated as part of the consideration-money of this conveyance, and has been deducted therefrom." *Belmont v. Coman*, 213.
6. A ENTERED INTO POSSESSION OF LAND UNDER AGREEMENT to purchase from B, the owner, and made valuable improvements, in 1848. In 1849

he executed a mortgage of the land to C, to secure the payment of a note made to C, for six hundred dollars, payable in 1850. In 1851 he received a deed of conveyance in fee from B, and in 1854 executed a mortgage of the land to D, to secure the payment of a note made by him for one thousand eight hundred dollars. Deeds were all duly recorded. The mortgages not being paid, and the lands being insufficient to satisfy both mortgages. *Held*: 1. That mortgage to C, as between the parties, conveyed to C the legal possessory right of the grantor, and his equitable interest in the lands; 2. Upon execution of the deed by B to A, the fee so conveyed to A, by estoppel arising from his prior deed of warranty in fee to C, inured to C, who, as between the parties, thereby became vested with the fee; 3. That the obligation of estoppel became to C a muniment of title, adhering to and transmissible with the land, and obligatory upon the grantees of A, as well as upon his heirs; 4. That the deed to C, having priority of record of the deed to D, was entitled to the same respect in law and equity as against D that it was entitled to against B, his grantor. *Philly v. Sanders*, 316.

7. WHERE TWO LOTS ARE MORTGAGED TO SECURE SAME DEBT, and the mortgagor subsequently conveys one of the lots, the remaining lot is primarily liable under the mortgage; and it is immaterial that the consideration for the conveyance was not valuable, but natural love and affection. *Gaskill v. Sine*, 105.
8. PURCHASER FROM MORTGAGOR OF ONE OF TWO LOTS MORTGAGED FOR SAME DEBT is not affected by a release of the remaining lot, executed by the mortgagee to the mortgagor after the sale without the purchaser's consent. *Id.*
9. WHERE TWO LOTS ARE SUBJECT TO SAME MORTGAGE, AND MORTGAGOR CONVEYS ONE OF THEM, and the mortgagee afterwards releases to the mortgagor the remaining lot, if the lot released is sufficient to satisfy the entire debt, the mortgagee cannot resort to the first lot; but if sufficient to satisfy only a part of the debt, the first lot in the hands of the grantee will be answerable for the deficiency; accordingly, on a bill to foreclose, reference will be ordered to ascertain the amount due upon the mortgage and the value of the premises released. *Id.*
10. TENDER OF MONEY DUE ON MORTGAGE AT ANY TIME BEFORE FORECLOSURE DISCHARGES LIEN of the mortgage, though made after the law-day and not kept good. *Kortright v. Cady*, 145.
11. MORTGAGOR MAY HAVE IN FORECLOSURE SUIT DECREE FOR DEFICIENCY AGAINST GRANTEE OF MORTGAGOR, where grantee has covenanted in his deed from the mortgagor to pay off the mortgage. *Klapworth v. Dressler*, 69.
12. GRANTEE OF MORTGAGED PREMISES WHO DOES NOT COVENANT TO PAY OFF DEBT takes the premises subject to the incumbrance, but incurs no personal responsibility. *Id.*
13. UNDER PRAYER FOR SALE OF ENTIRE MORTGAGED PREMISES TO PAY WHOLE DEBT, complainant may have a decree to sell such portion of the premises to pay such part of the debt as the evidence may warrant. *Gaskill v. Sine*, 105.
14. IN STRICT FORECLOSURE, PLAINTIFF IS LEFT TO HIS EJECTMENT to obtain possession from the mortgagor. *Schenck v. Conover*, 95.
15. ACTION FOR INJURY DONE TO REALTY may be maintained by a holder of a mortgage upon such realty, who has obtained a judgment foreclosing such mortgage, and directing the sale of the realty, when such injury

was done to said premises before said realty was sold under such judgment, and prevented the full amount of the mortgage debt from being realized out of the premises, the mortgagor being insolvent, and the injury being committed wrongfully and fraudulently, with the intent to injure the holder of the mortgage. *Jones v. Costigan*, 771.

16. **EQUITY OF REDEMPTION DESCENDS TO HEIRS OF DECEASED MORTGAGOR**, and is not barred by a sale of the land, under a decree of foreclosure, in an action in which the administrator of such deceased mortgagor is the defendant, and the heirs are not joined. *Stark v. Brown*, 762.
 17. **SALE UNDER DECREE OF FORECLOSURE** will operate as an assignment of the mortgage debt, where the mortgagor died prior to the commencement of foreclosure proceedings, and his administrator was made a party thereto, but his heirs were not, and the purchaser at such sale will be treated as a mortgagee in possession. *Id.*
 18. **DEED OF MORTGAGED PREMISES, FROM PURCHASER AT MORTGAGE SALE**, where such sale only operated as a transfer of the mortgaged debt to the purchaser, will transfer the interest of the purchaser in such debt to the grantee in such deed, so that after the entry of such grantee upon such premises, he will stand in the position of a mortgagee in possession. *Id.*
- See **CORPORATIONS**, 12, 21; **HUSBAND AND WIFE**, 3; **MERCHANTS' LINES**, 8; **MISTAKE**, 1; **USURY**.

MUNICIPAL CORPORATIONS.

See **BONDS**, 4-6; **CORPORATIONS**; **HIGHWAYS**, 3-10; **NEGLECTENCE**, 13.

MURDER.

See **CRIMINAL LAW**, 6-13.

NEGLECTENCE.

1. **PLAINTIFF CANNOT SUSTAIN ACTION FOR NEGLIGENCE, AND MUST BE NON-SUITED**, where, from his own showing, he appears to have been guilty of negligence which contributed as a proximate cause to the injury. *Milwaukee and Chicago R. R. Co. v. Hunter*, 699.
2. **NONSUIT WILL NOT BE GRANTED ON GROUND OF FAILURE OF PLAINTIFF TO SHOW LACK** of contributory negligence, where his evidence makes out a clear case of injury from the negligence of the defendant, and no circumstance appears therefrom tending to prove that the plaintiff failed to exercise ordinary care. *Id.*
3. **RULE THAT BURDEN IS UPON PLAINTIFF TO DISPROVE NEGLIGENCE** on his part doubted. *Id.*
4. **NEGLECTENCE OF RAILROAD COMPANY IS SHOWN FROM EVIDENCE** that plaintiff was injured by train of the defendant, which approached without signals and ran into a loaded team of the plaintiff, which he was endeavoring to drive over the railroad crossing, which had been recently raised and rendered difficult to cross. *Id.*
5. **NEW TRIAL WILL NOT BE GRANTED ON GROUND THAT VERDICT IS CONTRARY TO EVIDENCE** in action against railroad company, because of admissions of contributory negligence made by plaintiff shortly after the accident while he was in an injured condition, and in answer to questions by agents of the company. *Id.*
6. **CONTRIBUTORY NEGLIGENCE IN ACTION AGAINST RAILROAD COMPANY** for injuries caused by a train running into a team at a crossing, is not shown

by evidence that the plaintiff's horse balked at the crossing, where the horse was a young horse whose habits were not confirmed, and where his balking might well be attributed to his inability to raise the loaded wagon over the track, which was being raised at the crossing, and had been left in an unfinished condition. Such evidence is, therefore, not ground for a new trial as newly discovered evidence. *Id.*

7. **EVIDENCE OF CONDITION OF TRACK AT CROSSING IMMEDIATELY AFTER INJURY** is admissible in an action against a railroad company for a collision with a team at a crossing. Though the question for the jury is its condition at the time, its condition immediately before and immediately after are proper circumstances to be considered. *Id.*
8. **FEATURES OF NEGLIGENCE** in regard to the specific grounds of complaint may be proved so clearly and incontestably that it may become the duty of the court to pronounce it such as a matter of law; but where the facts are controverted, and the existence or non-existence of them may fairly be presumed to affect the mind in a given exigency, the question whether the acts were or were not negligent is necessarily one for the jury. *Pennsylvania R. R. Co. v. Ogier*, 322.
9. **NEGLECTANCE IS WANT OF ORDINARY CARE** which a party ought to observe under the peculiar circumstances under which he is placed. *Id.*
10. **WHEN THERE IS CAUSE TO APPREHEND DANGER**, a greater degree of care is required than when no danger is expected. *Id.*
11. **ONE CANNOT TAKE ADVANTAGE OF HIS OWN WRONG**, where he has omitted to perform a duty, and by that omission another has been lulled into a fancied security, so that he goes into a dangerous place and receives an injury which he might have avoided if the other had performed his duty. Such other person in such case will not be permitted to charge contributory negligence on the injured party. *Id.*
12. **IF ONE WHO IS NOT ORIGINALLY LIABLE BE SUE**, he has no right of action against the original wrong-doer, even though the former had notified the latter of the action, and required him to defend, and an award was had against the former which he paid. *Borough of West Chester v. Apple*, 336.
13. **MUNICIPAL CORPORATION IS NOT LIABLE FOR DAMAGES** resulting from excavations made in its public streets by individuals, under a license from the corporation, for the purpose of introducing water from its main pipes into his private property, or from such individual's neglect to properly fill up the excavation. *Id.*
14. **IT IS QUESTION OF FACT FOR JURY, WHETHER LEAVING DOOR OF BUILDING IN COURSE OF CONSTRUCTION NEAR RAILROAD TRACK** partly open, through which sparks from an engine were driven, constitutes such negligence on the part of the owner or his servants as would preclude his recovery against the railroad company for a fire caused thereby. *Fere v. Buffalo etc. R. R. Co.*, 178.

See MASTER AND SERVANT; RAILROADS; TORTS.

NEGOTIABLE INSTRUMENTS.

1. **INSTRUMENT IS NOT PROMISSORY NOTE** under the statute of Anne when it consists of a promise to pay money to a party or order, at a certain place, "with exchange on New York;" because, in order to constitute such note, the promise must be fixed and absolute. *Read v. McNulty*, 467.

2. **PROMISSORY NOTE UNDER STATUTE OF ANNE** must be an engagement to pay a definite sum of money, or a sum which, if not defined, may be ascertained by the law alone, without resort to extrinsic circumstances. *Id.*
3. **CERTIFICATE OF DEPOSIT IS NOT NEGOTIABLE INSTRUMENT**, such as will enable an indorsee to maintain an action on it in his own name. *Id.*
4. **DEFENDANTS, A BANKING COMPANY**, issued a certificate of deposit for four thousand dollars in currency, to plaintiff's debtor, payable in like funds to the order thereon of the depositor, with interest: *Held*, that the certificate is to be regarded as a negotiable promissory note, notwithstanding the term "currency" was deemed at time and place of transaction to include the bank bills of sundry specie-paying banks outside the state, as well as those of the same character within the state. *Hove v. Hartness, Hill, & Co., 312.*
5. **BILLS AND NOTES SHOULD EXPRESS SUM FOR WHICH THEY ARE GIVEN IN BODY OF INSTRUMENT**; but an omission of the sum will not be fatal, or render the instrument invalid, if the true amount can be gathered from other parts of the writing. *Williamson v. Smith and Walker, 478.*
6. **WHERE DEFECT IN STATEMENT OF SUM EXISTS IN BILL OR NOTE**, the amount marked in the margin may be referred to for the purpose of removing any ambiguity in the language used, or to supply the amount where it is not stated in the body of the instrument. *Id.*
7. **WHERE AMOUNT IS LEFT BLANK IN BODY OF BILL OR NOTE**, the holder may fill it up with the amount stated in the margin. *Id.*
8. **IF DISCREPANCY EXIST BETWEEN AMOUNT STATED IN BODY OF BILL OR NOTE AND AMOUNT STATED IN MARGIN**, the former prevails; because the latter is only a memorandum, while the words used in the body of the contract are a part of the note. *Id.*
9. **PAROL EVIDENCE IS INADMISSIBLE TO SHOW THAT SUM STATED IN MARGIN OF BILL OR NOTE**, and not the sum stated in the body thereof, is the one intended by the parties. *Id.*
10. **EVERY MATERIAL ALTERATION OF INSTRUMENT DESTROYS ITS VALIDITY**; but an alteration making a bill or note conform to an agreement between the parties will not vitiate the instrument. *Id.*
11. **WHERE CURRENCY IN WHICH BILL OR NOTE IS TO BE PAID IS NOT MENTIONED**, the law will presume it to be the currency of the country where it is to be paid. But the intention of the parties is to be interpreted from the custom or usage of the place where the bill or note is made, if such a course can be adopted. *Id.*
12. **PROMISSORY NOTE DOES NOT OPERATE AS PAYMENT OR EXTINGUISHMENT** of original debt for which it is given, nor does it change its nature, unless it be expressly so agreed. The remedy is merely suspended, and upon the dishonor or non-payment of the note, if it be in the hands of the payee, it may be disregarded, and suit brought for the original indebtedness. *Bhant v. Walker, 709.*
13. **BILL OF LADING REGULARLY, FAIRLY, AND FOR VALUE INDORSED TO ANOTHER**, will pass the title in the goods to the indorsee. *Decas v. Skipper, 334.*
14. **NO TITLE CAN BE TRANSFERRED BY FRAUDULENT HOLDER** of a bill of lading to the property described in the bill by an indorsement of the bill to a purchaser for value who has no notice of the fraud. *Id.*
15. **PURCHASER CANNOT CLAIM TO BE INNOCENT**, if he takes an assignment of a bill of lading from one who appears, on the face of the bill, to be an

- agent. That fact is sufficient to put him upon his inquiry as to the true state of the title. *Id.*
26. ACTION FOR MONEY PAID WILL NOT LIE AGAINST MAKER OF NOTE at suit of payee who indorses the note and afterwards pays and takes it up. His remedy is upon the note, and not upon an account for money paid to the use of the maker. *Williams v. Dursi*, 548.
 27. ACCOMMODATION INDORSER OF NOTE, PAYING IT, CANNOT RECOVER OF MAKER ON MONEY COUNTS, but must sue on note; and if the note be barred by the statute of limitations, he cannot recover, although he may have paid the amount to the holder before the bar of the statute had interposed. *Id.*
 28. REASONABLE TIME MUST ELAPSE FOR PURPOSE OF NEGOTIATION, or presentment for payment, before negotiable certificate of deposit will be regarded as overdue, and it will not be so regarded two days after its date, when negotiated to a party receiving it in good faith, for a valuable consideration. *Hove v. Hartness, Hill, & Co.*, 312.
 29. ASSIGNER OF NEGOTIABLE CERTIFICATE OF DEPOSIT CAN ENFORCE PAYMENT by the maker thereof, and the latter cannot be held liable to an attaching creditor of the depositor. *Id.*

See BONDS, 4; STATUTE OF LIMITATIONS, 2; WITNESSES, 1.

NEW TRIAL.

1. GRANTING OR REFUSING NEW TRIAL IS IN DISCRETION OF COURT, where party's own witness testifies in such manner as to surprise the party calling him, after due caution used to learn what he will establish on the trial. *Debnas v. Margo*, 516.
2. NEW TRIAL WILL BE GRANTED WHERE PARTY SHOWING REASONABLE CARE AND DILIGENCE to provide himself with testimony to make out his case, using the ordinary caution of a prudent attorney in informing himself of the facts to which the witnesses will depose, is then disappointed by the testimony of his witnesses, so that an injury will result, which may be remedied by another trial. *Id.*

See NEGLIGENCE, 5.

NONSUIT.

See NEGLIGENCE, 1, 2.

NOTICE.

1. NOTICE IS NOT IMPARTED TO PURCHASER by a memorandum attached to a deed and recorded with it, when the memorandum is so defectively acknowledged as not to be entitled to record. *McKean and Elk Land Imp. Co. v. Mitchell*, 335.
2. PUBLICATION OF COPY OF NOTICE OF SALE OF REAL ESTATE UPON EXECUTION IS SUFFICIENT, if it be published in six successive numbers of a weekly newspaper, although the first publication be less than six weeks prior to the sale, provided the original notice has been posted, as required by the statute, forty-two days previous to the sale. *Olcott v. Robinson*, 126.

See AGENCY, 8; EXECUTORS AND ADMINISTRATORS, 7, 9; LIS PENDENS; STATUTES, 3.

NUISANCE.

1. **EQUITY WILL GRANT INJUNCTIVE RELIEF**, whenever it can be clearly proved that a place of sepulture is so situated that the burial of the dead there will endanger life or health, either by corrupting the surrounding atmosphere, or the water of wells or springs. *Clark v. Lawrence*, 241.
2. **WHERE ACT COMPLAINED OF WAS OF CHARACTER OF NUISANCE**, but the testimony was insufficient to satisfy the court that it amounted to such in the particular case, the supreme court directed an issue to be tried in the superior court of law to decide the fact. *Id.*
3. **OBSTRUCTION OF RUNNING STREAM OCCASIONED BY WASHING DOWN OF ITS BANKS DOES NOT IN LAW CONSTITUTE NUISANCE**, unless such obstruction is attributable to the acts or agency of man. *Mear v. Gault*, 687.
4. **INDIVIDUAL MAY ABATE PRIVATE NUISANCE**, if he can do so by peaceable means. *Id.*

See EQUITY, 2.

OFFICE AND OFFICERS.

1. **OFFICIAL ACTS ARE THOSE DONE BY VIRTUE OF OFFICE**; such as, if properly done, exculpate both the officer and his sureties from responsibility, but which, if neglected or improperly done, render both liable. *State v. Conover*, 54.
2. **UNOFFICIAL ACTS ARE SUCH AS ARE COMMITTED UNDER COLOR OF OFFICE**, but cannot be lawfully done or justified by the official character of the officer, or by any process in his hands. *Id.*

See QUO WARRANTO; SHERIFFS.

PARENT AND CHILD.

1. **FATHER, IF OF ABILITY, IS BOUND TO MAINTAIN HIS INFANT CHILDREN**, even though they may have property of their own. The court will, however, authorize the income arising from the estates of the infants to be applied to their support, whenever, under all the circumstances, it appears to be proper. *Evans v. Pearce*, 635.
2. **WHERE FATHER, HAVING IN HIS POSSESSION PROPERTY OF HIS INFANT CHILDREN**, makes no application to the court during his life-time to have the income of such property appropriated to their support, and makes no charge against them for their support or education, his estate, after his death, will not be allowed anything for their support without the clearest proof that justice requires it. In such a case, the father will be treated as a guardian, and his accounts will be settled on the principles applicable to guardians' accounts. *Id.*
3. **ILLEGITIMATE SON OF WOMAN TAKES EQUALLY WITH HER LEGITIMATE CHILDREN** under a devise from her father to her for life, and at her death the property to be equally divided among her children. *Bennett v. Toler*, 638.

See ESTATES OF DECEDENTS, 2; INFANCY.

PARTITION.

1. **WHERE THERE HAS BEEN PARTITION BETWEEN TENANTS IN COMMON IN TEXAS**, and there is failure of title, the remedy is in a court of chancery, either by setting aside the partition when improperly made, and it can be done without injustice to others, or by contribution when it is most proper. *Ross v. Armstrong*, 574.

3. **JUDGMENT IN PARTITION IS CONCLUSIVE WHEN ATTACKED COLLATERALLY.**
In a suit for partition, the finding and determination of a court of general jurisdiction, as to the existence and interests of parties unknown, as well as to the sufficiency of an affidavit authorizing the publication of notice under the statute, is binding in all collateral attacks upon the judgment, especially when the allegations of the complaint, and the statement of facts in the affidavit, are in substantial conformity with the statutory requirement. *Nash v. Charck*, 678.
3. **ALLEGATION AS TO "UNKNOWN OWNERS" IN ACTION OF PARTITION IS SUFFICIENT** if in the following words: "That such portions of said tract as do not belong to defendants and to your orators belong to unknown owners." *Id.*
4. **UNKNOWN OWNER, PROCEEDED AGAINST BY ADVERTISEMENT, IN ACTION OF PARTITION, IS BOUND BY JUDGMENT THEREIN**, though in possession of the premises, claiming in severalty by paramount title, not a party by name, and without actual notice, where the statute makes the judgment binding and conclusive on unknown owners who have been served by publication. *Id.*

PARTNERSHIP.

1. **EXISTENCE OF PARTNERSHIP MUST BE DENIED**, if it is alleged in the complaint, within the time limited by statute by affidavit, or the truth of the allegation is deemed admitted. *Fisk v. Tank*, 737.
2. **PARTNER IS GENERAL AGENT FOR HIS FIRM**, but only within the scope of its business. *Savings Fund Society v. Savings Bank*, 390.
See DEPOSITIONS, 3; INJUNCTIONS, 2.

PAWNS.

See INJUNCTIONS, 2.

PAYMENT.

See NEGOTIABLE INSTRUMENTS, 12.

PLEADING AND PRACTICE.

1. **OBJECTION TO MODE OF BRINGING CASE BEFORE COMPETENT COURT** must be made before a general appearance and plea in bar. *Schenley v. Commonwealth*, 359.
2. **PLAINTIFF MAY PROPERLY DISMISS AS TO PARTY DEFENDANT** after answer, notwithstanding another defendant set up a defense in his answer which was unfavorable to his co-defendant. *Stone v. Darnell*, 582.
3. **CAUSE OF ACTION BY PRINCIPAL AGAINST AGENT FOR FRAUDULENTLY SELLING LAND CANNOT BE UNITED**, it seems, under section 167 of the New York code of procedure, with a cause of action against the purchaser, as a trustee, for a reconveyance or an accounting. *Gardner v. Ogden*, 192.
4. **OMITTING FROM PLEADING PORTION OF CONTRACT WHICH IS DECLARED UPON** is not a material variance between the allegations and proof, unless it shall actually mislead the adverse party to his prejudice in maintaining his action or defense upon its merits. At common law, variances of this kind were fatal, but the rule has been changed in Wisconsin by statute, and the court may order the pleading amended so as to conform to the facts, upon such terms as may be just, or it may disregard it altogether. *Fisk v. Tank*, 737.

5. WHERE COMPLAINT CONTAINS ALLEGATIONS OF SEVERAL BREACHES OF SAME CONTRACT, in the same count, a motion to compel the pleader to elect upon which of the claims stated he will proceed and to abandon the others should be overruled. Such motion should be granted only when the complaint contains several causes of action improperly blended. *Id.*
6. NEW MATTER OF DEFENSE NOT RESPONSIVE TO BILL MUST BE SUSTAINED BY EVIDENCE. *Gashill v. Stoe*, 105.
- See APPEAL; CORPORATIONS, 22; INSTRUCTIONS; JUDGMENTS; NEW TRIAL; PARTNERSHIP, 1; QUO WARRANTO; WITNESSES; WRITS OF ASSISTANCE.

PLEDGES.

See INJUNCTIONS, 2.

PRESCRIPTION.

See ADVERSE POSSESSION; ANCIENT LIGHTS, 2, 3; EASEMENTS, 1.

PRINCIPAL AND AGENT.

See AGENCY.

PRIVILEGED COMMUNICATIONS.

See LIBEL.

PROBATE COURTS.

See JURISDICTION, 1-5.

PROMISSORY NOTES.

See NEGOTIABLE INSTRUMENTS.

PUBLIC LANDS.

1. COMMISSIONER OF GENERAL LAND-OFFICE IS PROPER OFFICER to accept relinquishments of title by a grantee to the state, as his is the office or department in which to preserve the evidences of the public lands and land titles of the state; and in the absence of any legal provision or prohibition, he must be deemed to have authority to accept the relinquishment of title on behalf of the state. *Dikes v. Miller*, 571.
2. ORIGINAL DEED OF RELINQUISHMENT TO STATE BY GRANTEE is an archive, and a copy certified as such by the keeper of the records is admissible in evidence. *Id.*
3. ORIGINAL DEED, ON FILE IN OFFICE OF COMMISSIONER of public lands, if not an archive, cannot be removed from the office, and where its non-production in evidence is thus accounted for, its execution and contents may be fully proved by a copy certified by the commissioner, such copy being the best evidence of which the nature of the case is susceptible. *Id.*
4. GRANTEE OF HEAD-RIGHT CERTIFICATE PLACING IT IN HANDS OF LOCATOR, under a covenant to locate, survey, and obtain a patent, and then to divide the land between the owner and the grantee, does not thereby make a sale of land, although formal words of conveyance are used and a money consideration paid; but the agreement is one for the future acquisition of land under which the purchaser is to make the selection, and the parties are to participate equally in the benefits to be derived from the selection when made. *Ross v. Armstrong*, 574.

5. **CONTRACT WHEREBY HOLDER OF HEAD-RIGHT CERTIFICATE** places it in the hands of a locator under a covenant to locate, survey, and obtain a patent, and then divide the land between the owner and the grantee, where it is really an adventure on shares, and the patent is to issue in the name of one for the benefit of both, is a resulting trust, in which the grantee becomes the trustee for the benefit of his equitable tenant in common. *Id.*
6. **UNDER JOINT ADVENTURE BETWEEN HOLDER OF HEAD-RIGHT CERTIFICATE AND LOCATOR** to secure patent to government land, and to divide the land when acquired, if, after securing the grant and dividing the land, it is discovered that part of the land which the government has thus granted had been previously appropriated by older title, the partition is one upon a mistake of facts from which equity will relieve. *Id.*

QUANTUM MERUIT.

1. **ONE WHO ENGAGES TO WORK FOR FIVE MONTHS**, and voluntarily breaks the engagement at the end of four months, can, nevertheless, maintain an action on a *quantum meruit* for services. *Riggs v. Horde*, 584.
2. **MEASURE OF DAMAGES IN ACTION BY TEACHER ON QUANTUM MERUIT** for her services in teaching for a part of the session during which she was engaged, where the failure to complete the contract is neither the fault of the plaintiff nor of the defendants, is the value of her services for the time during which she taught, not by a *pro rata* division of the time for which she was to teach, but according to the actual value of her services, or the amount of benefit defendants received, not to exceed the contract price. *Id.*

QUESTIONS OF LAW AND FACT.

See AGENCY, 1, 2; NEGLIGENCE, 8, 14.

QUO WARRANTO.

- ANSWER OF NOT GUILTY OR NON USURPAVIT IS BAD IN QUO WARRANTO.** The defendant must either justify or disclaim the holding. *Attorney-General v. Foote*, 689.

RAILROADS.

1. **RAILROAD COMPANY IS NOT LIABLE AS COMMON CARRIER**, but as mere bailee for hire, where the agent of the company is guilty of negligence in failing to deliver a piece of machinery consigned to him for shipment with other pieces of machinery. *Foard v. Atlantic etc. R. R. Co.*, 277.
2. **MEASURE OF DAMAGES AGAINST RAILROAD COMPANY** for the negligence of its agent in failing to deliver a piece of machinery consigned to him with other pieces of machinery, for shipment, and by which the whole is kept idle, is compensation for the capital invested—that is, legal interest; also for any workmen thus necessarily unemployed, expenses incurred in sending for the missing machinery, and any other damages which are the direct and necessary result of such negligence. *Id.*
3. **RAILROAD COMPANY IS REQUIRED TO USE GREATER CARE IN RUNNING ITS TRAINS THROUGH VILLAGES**, where wooden buildings are so near its road as to be exposed to fire from locomotives, than in the open country. *Fero v. Buffalo etc. R. R. Co.*, 178.
4. **RAILROAD COMPANY IS BOUND TO USE UTMOST CARE IN RUNNING ITS TRAINS THROUGH VILLAGES**, to guard against fire to wooden buildings

near its track, especially at a time when the wind is blowing from the engine towards the buildings. *Id.*

5. **OWNER OF BUILDINGS NEAR RAILROAD TRACK IS BOUND TO USE SUCH CARE** in protecting them against fire from the locomotives as a man of ordinary prudence would have employed under the same circumstances; and he is not deprived of redress against the company for its negligence by the fact that had he been more vigilant, the injury might not have happened. *Id.*
6. **RAILROAD COMPANY, AS COMMON CARRIER, IS LIABLE AS INSURER** for the safe transportation of goods and of the baggage of passengers. *Nashville etc. R. R. Co. v. Elliott, 506.*
7. **LIABILITY OF RAILROAD COMPANY FOR INJURY TO PASSENGER IS**, that the company is held bound to the highest degree of care and diligence; and is responsible for all injuries to passengers resulting from the slightest negligence or want of skill or prudence. *Id.*
8. **SERVANT OR EMPLOYEE OF RAILROAD COMPANY, WHO VOLUNTARILY ENGAGES TO SERVE IT**, is presumed to know that there are extraordinary dangers inseparable from such service, which human care and foresight cannot guard against. *Id.*
9. **EMPLOYEE, WHO VOLUNTARILY ENGAGES TO SERVE RAILROAD COMPANY**, in view of all the hazards to which he will be exposed, undertakes, as between himself and his employer, to run all the ordinary risks of the service; and this includes the risk of injuries, not only from his own want of skill or care, but likewise the risk of injuries from the negligence of his fellow-servants. But this doctrine is subject to the qualification that the employer must take care not to expose the servant to any risk, by associating him with other servants wanting in ordinary skill or care, or by the use of unsafe or unsuitable machinery, or by other culpable negligence. *Id.*
10. **RAILROAD COMPANY IS NOT LIABLE FOR INJURY TO EMPLOYEE WHEN.**—A railroad company is bound to see that its road is in good order, and safe; and that the engines, etc., are perfect and properly constructed according to the present state of the art; and to have competent and prudent engineers. If the road and machinery are safe and perfect, and by accident the locomotive runs off the track and injures a servant of the company, the latter, in the absence of any fault or negligence on their part, will not be responsible for such injury. *Id.*
11. **RAILROAD COMPANY IS LIABLE FOR INJURY TO EMPLOYEE, WHEN.**—Where a locomotive, by accident, runs off the track and injures a servant of the railroad company, the latter is liable to the servant for such injury if it was occasioned by any imperfection in the road or machinery, of which the company had knowledge, or of which they, in the exercise of ordinary care, might have known; or by associating the servant with other servants wanting in ordinary skill or care; or by other culpable negligence on the part of the company. *Id.*
12. **RAILROAD COMPANY IS OBLIGED TO SEE THAT ENGINES AND APPARATUS ARE SUITABLE, SUFFICIENT**, and "as safe as care and skill can make them." This general doctrine is regulated by the proportion and importance of the business, and the perils incident to it. But if an engine, though not constructed according to the latest model, is shown to be safe, and as well adapted, in all respects, to the service, as one of more recent invention but of different construction, it is sufficient. *Id.*

12. IF ENGINEER OF RAILROAD COMPANY KNOWS THAT ROAD OR MACHINERY IS DEFECTIVE, his knowledge is knowledge of such defect on the part of the company. *Id.*

See BONDS, 4-6; CORPORATIONS, 18-21; EMINENT DOMAIN, 2-5; MECHANICS' LIENS, 1; NEGLIGENCE, 4, 7, 14.

RAPE.

See CRIMINAL LAW, 14.

RENT.

See CO-TENANCY, 1-4.

RESTRAINTS ON ALIENATION.

1. CONDITION, IN RESTRAINT OF ALIENATION, ANNEXED TO ESTATE IN FEE SIMPLE, IS TO BE STRICTLY CONSTRUED, as it is against the general policy of the law. *Brothers v. McCurdy*, 388.
2. "OFFER" OR "ATTEMPT" TO ALIEN CANNOT BE RESTRAINED. Such a prohibition is too vague and uncertain; and therefore void, for an offer is not an issuable fact. *Id.*
3. "ACTUAL" ALIENATION IS NOT WITHIN CONDITION AGAINST "OFFER" TO ALIEN. *Id.*
4. CONDITION ANNEXED TO DEVISE IN FEE THAT DEVISEE SHALL NOT "OFFER" TO ALIEN FOR PARTICULAR PURPOSE IS VOID for uncertainty; and the devisee will take an indefeasible estate. *Id.*

RETROSPECTIVE LAWS.

See CONSTITUTIONAL LAW, 2.

RIPARIAN RIGHTS.

LAKE CAN BE DRAINED ONLY BY NATURAL OUTLET, for the owners along a creek forming such outlet have a legal right to the natural flow of the waters of the lake through it, and any artificial drain would deprive them of this flow. *Mohr v. Gaul*, 687.

SALES.

1. CHANGE OF POSSESSION IS RULE OF LOCAL POLICY UNIFORMLY REQUIRED IN TRANSFER OF ALL PERSONAL PROPERTY situated in Vermont, in order to place it beyond the reach of process against the transferor, and is not controlled by the law of the state where the contract is made. *Rice v. Curtis*, 597.
2. EVIDENCE AS TO DECLARATION OF VENDOR AFTER SALE IS COMPETENT TO SHOW FACT OF SALE. Where A sold personal property to B, which was subsequently levied on by A's creditors as A's property, and B sues for its recovery, it is competent for B to prove, by a third person, that some years after the sale, when A and B were together, such person heard them declare the fact of sale and its terms. *Mulholland v. Elliston*, 495.
3. DECLARATIONS AGAINST INTEREST AND THOSE COMING FROM PRIVY IN ESTATE ARE ADMISSIBLE. Where A sold personal property to B, which A's creditors subsequently levied on as A's property, and B sued for its recovery, A's admission that he had sold the property will, in a contest between A and B in regard to its title, be competent against A, upon

the principle of a declaration against his interest. So in a similar contest between B and a third party claiming under him, B's declaration of the fact of sale or its terms, made before the existence of the debts of A's creditors, and before B's sale to such party, is admissible because the purchaser is in privity with his vendor, and took the property incumbered with B's declarations. They are admissible, not only as coming from a privy in estate, and therefore from the party himself, but also as a method of establishing title. *Id.*

4. ADMISSIONS AS TO FACT OF SALE, BY PARTY THERETO, ARE ORIGINAL, NOT HEARSAY, EVIDENCE, and may be proved by any competent witness who heard them, without calling the party by whom they were made. They are to be taken as parts of the *res gestæ*, and it is immaterial whether such party be dead or alive, or that he may be examined as a witness. His declarations are still admissible as a mode of making out title. *Id.*
5. EFFECT OF DECLARATION AS TO FACT OF SALE, WHEN MADE BEFORE AND AFTER LIEN OF CREDITORS HAS ATTACHED. Where A sold property to B, and A's creditors attached it as A's property, admissions made by A and B as to the fact of sale, and before the judgment and levy on the property, are competent proof, though the debts of the creditors originated anterior to the declarations, or even before the purchase by B. But if the lien of the creditors attached prior to such admission, then the creditors cannot be affected by the declaration of sale. And one who levies on the property is subject to the same rules of evidence. *Id.*
6. VENDOR, UPON EXECUTED SALE OF SPECIFIC GOODS, will not be held liable for any defects in the quality of the articles sold, in the absence of fraud or express warranty; but this rule has no application to cases of executory contracts, for the manufacture and sale of goods *in futuro*. *Rodgers v. Niles*, 290.
7. DEFENDANTS AGREED TO MAKE AND DELIVER TO PLAINTIFFS, at a future day, for a stipulated price, three steam-boilers to be used in running the engines in the plaintiffs' rolling-mill: *Held*, that it was impliedly stipulated in the contract that the boilers should be free from all such defects of material and workmanship, whether latent or otherwise, as would render them unfit for the usual purposes of such boilers. *Id.*

See EXECUTORS AND ADMINISTRATORS, 7-9; WARRANTY.

SERVITUDES.

See EASEMENTS.

SHERIFFS.

1. SHERIFF WHO, HAVING EXECUTION against the goods and chattels of one person, levies upon and sells those of another, is not guilty of a breach of the condition of his official bond; and his sureties are not thereby rendered liable. *State v. Conover*, 54.
2. SHERIFF SEIZING PROPERTY OF STRANGER to the execution is a trespasser, and may be resisted. If he calls for assistance, he and his assistants are all trespassers, and may be resisted by force. If the party resisting be indicted for obstructing an officer, it must appear that the officer was acting in his official capacity, with legal process or other authority to do what he was attempting when obstructed, and if it appear that he was acting under color, and not by virtue of official authority, the party resisting is not liable, civilly or criminally. *Id.*

3. IF SHERIFF, HAVING EXECUTION in his hands, seize the property of a stranger, he is a trespasser, and may be sued for the tort in his private capacity; but for such unauthorized act, his sureties are never responsible. *Id.*
4. WHEN SHERIFF LEVIES EXECUTION UPON SUFFICIENT PROPERTY WHEN IS TAKEN FROM HIS POSSESSION under replevin suit, in which he obtains judgment, it is his duty to prosecute the sureties in the undertaking of the plaintiff in such replevin suit, and he is not entitled to indemnity from the plaintiff in the execution as a condition of his prosecuting the undertaking. *Sweeney v. Lott*, 160.
5. IN ACTION AGAINST SHERIFF FOR NOT RETURNING EXECUTION WHEN NO EXCUSE IS SHOWN for his not prosecuting the undertaking in replevin, except the absence of an indemnity for costs, the sheriff is liable for the amount of the debt, and has no counter-claim for expenses in the replevin suit, although they may be within the terms of the bond to indemnify him. *Id.*
6. UNSIGNED RETURN OF SHERIFF IS ADMISSIBLE IN EVIDENCE in an action against him, and binds the sheriff the same as if it had been properly signed. *Rudy v. Commonwealth*, 330.

See EXECUTIONS; EXECUTORS AND ADMINISTRATORS.

SPECIFIC PERFORMANCE.

See VENDOR AND VENDEE.

STATUTES.

1. EXISTENCE OR TIME OF TAKING EFFECT OF PUBLIC STATUTE CANNOT BE PUT IN ISSUE, or admitted or denied by the pleadings, but must be determined by the judges themselves. Accordingly, an allegation in answer to *quo warranto*, that a statute under which the defendant claims to hold office was published and went into effect prior to the day of his alleged election, is not admitted by a demurrer to such answer. *Attorney-General v. Foote*, 689.
2. DATE OF CERTIFICATE OF SECRETARY OF STATE APPENDED TO PUBLISHED VOLUMES OF STATUTES will, in the absence of any suggestion which may lead to a more accurate inquiry, be taken to be the date of their publication and taking effect. *Id.*
3. COURTS ARE BOUND TO TAKE NOTICE AS WELL AS TO TIME WHEN PUBLIC STATUTE GOES INTO EFFECT as to its provisions. *Id.*

STATUTE OF FRAUDS.

1. WHEN PARTY TO AGREEMENT, VOID BY STATUTE OF FRAUDS, fails to execute it, the price advanced, or the value of articles delivered in part performance of the contract, whether in money, labor, or chattels, may be recovered back. In such cases, the law raises, by implication, a promise to pay advances made upon the faith of the contract, and for which no consideration has been paid. *Smith v. Adm'r of Smith*, 49.
2. ORAL PROMISE TO GIVE OR DEVISE TO SON OF PROMISOR a farm, then in possession of the former as tenant of the latter, is within the statute of frauds, and void, although the son, with the assent of the father, erects buildings on the premises, relying upon such promise. *Id.*

3. AGENT MAY SIGN MEMORANDUM OF CONTRACT IN NAME OF PRINCIPAL, so as to comply with statute of frauds, though not authorized thereto in writing. *Blackwell v. Parish*, 239.

See EASEMENTS, 3.

STATUTE OF LIMITATIONS.

1. TO TOLL RUNNING OF STATUTE OF LIMITATIONS IN FAVOR OF GRANTOR, against grant by deed, of privilege of mining coal, an entry to exercise the privilege must be made or authorized by some person having rights under the grant. *Caldwell v. Copeland*, 436.
2. STATUTE OF LIMITATIONS COMMENCES TO RUN, in action by indorser against maker of note, if suit is brought upon the note, not from the time of payment, but from the time when the note is due and payable. *Williams v. Duret*, 548.
3. STATUTE OF LIMITATIONS DOES NOT BEGIN TO RUN AGAINST DEFENDANT IN EJECTMENT in possession of land excepted out of a sale by the sheriff under execution, so as to bar such defendant's right to the relief of having the sheriff's deed reformed so as to show that such land had been so excepted, until the suit is commenced. *Bartlett v. Judd*, 131.
4. STATUTE OF LIMITATIONS BEGINS TO RUN WHEN.—Where an incorporation is empowered by statute to collect assessments by sale of stock, and then by suit for the balance due, the statute of limitations does not begin to run till the stock is sold and the balance ascertained; and suit for such balance may be brought any time within three years from the sale. *Cape Fear etc. Nav. Co. v. Wilcox*, 260.

See ADVERSE POSSESSION.

STREETS.

See HIGHWAYS; NEGLIGENCE, 13.

SUBROGATION.

CREDITOR IS ENTITLED TO BENEFIT OF ALL COLLATERAL OBLIGATIONS FOR PAYMENT OF DEBT which surety thereon has received for his indemnity. *Klipsorth v. Dressler*, 69.

See SURETYSHIP, 1, 2.

SUBSCRIPTIONS.

CONDITION.—PARTY MUST PAY AMOUNT SUBSCRIBED, where, to induce an organized railroad company to construct its road upon a particular route, he subscribes to a certain number of shares of stock, upon condition that the prescribed route should be taken, and the condition is complied with. *Spartanburg etc. R. R. Co. v. De Graffenreid*, 476.

See CORPORATIONS.

SURETYSHIP.

1. SURETY PAYING DEBT OF PRINCIPAL IS ENTITLED, IN EQUITY, to be subrogated to all the creditor's rights in securities for the debt placed in the latter's hands by the principal. *Mitchell v. De Witt*, 561.
2. IF, AFTER JUDGMENT AGAINST PRINCIPAL AND SURETY, a third person gives his note for the debt to obtain a stay of execution for the principal,

and the surety is afterwards obliged to pay the debt, he is entitled to have an assignment of the judgment on the note of the third person, to indemnify him for such payment. So held, where the original principal in a debt prosecuted a writ of error, and the original surety or indorser of the note afterwards paid the debt, and asked to have the judgment against the original defendants and sureties on the *superseas* bond assigned to him. *Id.*

See MORTGAGES, 4; OFFICE AND OFFICERS, 1; SUBROGATION.

TAXATION.

1. LEGALITY OF CITY ORDINANCE REQUIRING PAYMENT OF MONEY FOR LICENSES TO RETAIL SPIRITUOUS LIQUORS, and imposing a heavy penalty for a violation, may be tested by party making payment in action to recover back the money. *City of Marshall v. Snediker*, 534.
2. WHERE CITY COUNCIL EXCEEDS ITS AUTHORITY IN MAKING TAX ASSESSMENT, and demands and receives more than the charter permits, which was paid under pressure of the summary remedies prescribed for collection, and of a heavy penalty for non-payment, it is against good conscience to retain the money, and action will lie to recover it back. *Id.*
3. GENERAL POWER OF TAXATION WAS CONFERRED BY CHARTER UPON CITY COUNCIL, limited by the provisions: 1. That the tax on property should not in any one year exceed one half of one per cent *ad valorem* on such property; 2. That such tax should be apportioned in the same manner as the state tax: *Held*, that the assessment of corporation taxes upon occupations, under such charter, discriminating against an occupation in a degree beyond that made on such occupation by the legislature in the collection of state and county taxes, is unwarranted, and if enforced, the money so illegally exacted may be recovered back by the party injured. *Id.*
4. TAX OUGHT NOT TO BE RENDERED INVALID BY MERE NON-COMPLIANCE WITH SOME DIRECTION OF STATUTE, notwithstanding which the tax may have been entirely just and equal, or by any objection which does not go to the very groundwork of the tax. *Mills v. Gleason*, 721.

See CONSTITUTIONAL LAW, 1; CORPORATIONS, 26, 27.

TELEGRAPHS.

1. TELEGRAPH COMPANY IS AGENT OF RECEIVER OF MESSAGE transmitted by it, as well as of the person who directed the message to be transmitted. *N. Y. & W. Printing Tel. Co. v. Dryburg*, 338.
2. TELEGRAPH COMPANY IS LIABLE IN DAMAGES TO THIRD PARTIES for the misfeasance of its employees, even though it be considered simply as the agent of the sender of message. *Id.*
3. LIABILITY OF TELEGRAPH COMPANY TO RECEIVER OF MESSAGE transmitted by it is not altered by the fact that the party who sent the telegram did not insure it nor have it repeated. *Id.*
4. TELEGRAPH COMPANY MUST SEND VERY MESSAGE PRESCRIBED. They must follow copy; and for a failure to do so, they are liable in damages in an action on the case to the party to whom the message is sent. *Id.*
5. MALICE IS NOT GIST OF ACTION against a telegraph company for damages for a failure to send a telegram as it was written. *Id.*

TENANTS IN COMMON.

See CO-TENANCY.

TENDER.

WHERE TENDER MERELY DEFEATS PARTICULAR REMEDY, BUT DOES NOT DISCHARGE DEBT, it is not necessary to show continued readiness to pay or to bring the money into court. *Kortright v. Cady*, 145.

See MORTGAGES, 10.

TORTS.

JOINT TORT-FEASORS ARE JOINTLY LIABLE for injuries which result from their concurrent negligence. This is not to be confounded with cases of trespass brought for separate acts done by two or more persons. If there has been no concert of action, no common intent, there is no joint liability. *Klauder v. McGrath*, 329.

TRADE-MARKS.

1. **DESIGNED IMITATION OF TRADE-MARK**, whereby one is enabled to fraudulently pass off his goods in the market as those manufactured by another, to the latter's injury, renders the former liable for any injury sustained. Such imitation may consist in the appropriation of the words "Roger Williams" from a trade-mark known as "Roger Williams Long Cloth." *Barrow v. Knight*, 452.
2. **WHETHER PARTIAL IMITATION OF TRADE-MARK** by one was designed, calculated, and effectual to carry out a fraud upon another, is a question upon the evidence for the jury. *Id.*

TRESPASS.

1. **LIABILITY FOR CONSEQUENTIAL DAMAGES IN EXCEEDING LICENSE OR ABUSING AUTHORITY**.—If one having a right, by license, to enter upon another's land, for a lawful purpose, exceed his license or abuse his authority, he is liable for consequential damages arising from his wrongful act, in an action of trespass *quare clausum fregit*. *Kissecker v. Monn*, 379.
2. **TRESPASS QUARE CLAUDUM FREGIT MAY PROPERLY BE BROUGHT AGAINST PARTY HAVING LICENSE TO ENTER ON ANOTHER'S LAND**, who, in taking down a gate erected thereon to enable him to enter, neglects to restore it to its place, in consequence of which his swine trespass upon the plaintiff's land. And defendant, under this form of action, may be held liable for the damages thus occasioned. *Id.*

See CO-TENANCY, 5; CRIMINAL LAW, 4; SHERIFFS, 2, 3; TORTS.

TRUSTS.

1. **MERE DRY TRUST WILL NOT BE SUSTAINED** when persons equitably entitled to any property take absolutely the entire beneficial interest, and the trustee has no duty to perform; unless it be a special trust intended to accomplish some object, as to preserve contingent remainders, protect property for the sole and separate use of a married woman, or from the creditors of the *cestui que trust*. *Kay v. Scates*, 399.
2. **TRUSTS WILL NOT BE SUSTAINED, BUT WILL BE TREATED AS EXHOUTED**, and the legal estate as vested in the *cestui que trust*, where the persons named as trustees have no duties to perform which require the seisin or possession of the estate to be in them, and the persons for whose use the trust was created are *sui juris*. *Id.*

3. TRUST WILL NOT BE SUSTAINED ON GROUND THAT IT IS FOR SOLE AND SEPARATE USE of a woman, if she was unmarried when the will took effect, and there was at the time no marriage in immediate contemplation. *Id.*
4. TRUST WILL NOT BE CONSIDERED EXERCISED until the time at which the full beneficial enjoyment of the interest devised shall vest. *Id.*
5. WHEN NOMINAL TRUST OPERATES TO CLOUD TITLE AND EMBARRASS ALIENATION, a conveyance will be decreed in accordance with the practice of courts of chancery. *Id.*
6. WHERE NOTHING APPEARS ON FACE OF TRUST DEED to indicate a contrary intention (a woman and her children being the beneficiaries), it will vest an estate in the woman and her children then born and in one *en ventre sa mere* as tenants in common, but no title vests in her children afterwards begotten. *Id.*

See CO-TENANCY, 7.

UNINCORPORATED SOCIETIES.

See BUILDING ASSOCIATIONS.

USAGE.

See CONTRACTS, 1; NEGOTIABLE INSTRUMENTS, 11.

USE AND OCCUPATION.

See CO-TENANCY.

USURY.

CONTRACT OF LOAN ASSOCIATION IS USURIOUS when it sells to one of its members its cash funds at a premium, giving one thousand three hundred dollars, and taking a bond secured by mortgage for two thousand dollars, bearing six per cent interest, and payable in monthly payments of twenty dollars each. *Building etc. Ass'n v. Bollinger*, 463.

See INTEREST.

VENDOR AND VENDER.

1. INSTRUMENT IN WRITING, SIGNED AND SEALED BY OWNER OF LAND, with blanks as to the name of the bargainee, and left with an agent authorized by parol to fill the blanks with the name of the purchaser, and the price, though ineffectual as a deed, may be specifically enforced as a contract for the sale of land, signed for the person to be charged therewith by his lawfully authorized agent. *Blackall v. Parke*, 239.
2. COURT OF EQUITY UPON SALE OF LAND UNDER ITS DECREE WILL ENFORCE DELIVERY OF POSSESSION to the purchaser by injunction and writ of assistance, without driving him to an action of ejectment, provided the possessor does not claim by title paramount. *Schenck v. Conover*, 95.
3. COURT OF EQUITY WILL GIVE FULL EFFORT TO ITS DECREE FOR SALE and conveyance of mortgaged premises by putting the purchaser into possession. *Id.*
4. PROPER MODE OF PROCEEDING BY PURCHASER AT FORECLOSURE SALE TO OBTAIN POSSESSION IS: 1. A demand of possession by the purchaser of the tenant in possession, accompanied by an exhibit of the deed from the sheriff or master; 2. Order to deliver possession; 3. Injunction; and 4.

Writ of assistance; though it seems that the injunction may be dispensed with. *Id.*

6. WHERE VENDEE IN POSSESSION UNDER PAROL AGREEMENT for the purchase of lands makes improvements upon the premises, he cannot recover the value of such improvements in an action at law upon the refusal of the vendor to fulfill the contract. *Smith v. Adm'r of Smith*, 49.
6. WHERE SON WHO IS TENANT OF HIS FATHER'S ESTATE makes improvements thereon in pursuance of a promise from the father that upon his death the title to the land shall vest in the son, and the father dies without giving such title, neither the vesting of the title to the land, upon which the improvements were erected, in the son as one of the heirs of the intestate, nor the assignment of such land to the son under an agreement among the heirs, can be regarded as a performance of the intestate's contract. The son may therefore recover of the estate the value of the improvements erected. *Id.*
7. SON MAY RECOVER VALUE OF IMPROVEMENTS ERECTED, where, being the tenant of his father's estate, he makes such improvements under a promise from the father that upon his death the title to the land shall vest in the son; but the father dies without such title vesting in the son, and an agreement among the heirs contemplates an equal division of the intestate's estate among all the heirs, allowing the son no compensation for the improvements more than he would have received as an heir at law, had the improvements been made by him gratuitously, and exclusively for his father's benefit. *Id.*
8. WHERE SON WHO IS TENANT OF HIS FATHER refuses to make improvements until he has his father's promise that upon his death the title to the land shall vest in the son, if the son makes the improvements, but fails to get the title to the land, such improvements inure to the benefit of the estate, but the son may recover the value thereof. *Id.*
9. VENDOR EXPRESSLY COVENANTING TO FURNISH VENDEE COMPLETE CHAIN OF TITLE for each of several parcels of land, and failing so to do, the vendee not to be bound to pay for those portions of the land for which he might be unable to furnish such title, is estopped from saying that his vendee has not been injured by his failure to perform such covenant; nor can he be heard to say that the title of his vendee has become invulnerable by lapse of time, or been perfected in any other manner. *Stillman v. Canales*, 530.
10. SALE OF LAND BY VENDEE, WITH OR WITHOUT WARRANTY, is not a waiver of an express condition, upon the performance of which alone the vendor was entitled to claim the payment of the purchase-money. *Id.*
11. ONE WHO HAS RECOGNIZED VALIDITY OF GRANTOR'S TITLE TO PREJUDICE OF GRANTEE by receiving, from the latter, payment of a debt secured by an attachment upon the land as the property of the grantor, is estopped as against such grantee afterwards to set up the fraudulency and invalidity of such title. *Seymour v. Lewis*, 108.
12. JUDGMENT AGAINST EQUITABLE ESTATE OF VENDEE in the land purchased attaches to the legal estate therein as soon as it vests in such vendee. *Waters's Appeal*, 354.
12. VENDOR IS ESTOPPED AS AGAINST SUBSEQUENT CREDITORS, where he takes from the vendee a confession of judgment for the balance of the purchase-money of land sold to the latter, and subsequently conveys the legal title to the vendee, by a deed containing a statement that the consideration is paid, and releasing to the vendee all the vendor's "estate,

right, title, interest, claim, and demand whatsoever, in law or equity," in and to the land, concluding with a clause of general warranty. These circumstances do not work an estoppel by deed, but do amount to an estoppel *in pais*, and such vendor cannot claim as against those who have credited his grantee upon the faith of this deed. *Id.*

VENUE.

See DEPOSITIONS, 4.

VOLUNTARY PAYMENTS.

RULE THAT MONEY PAID VOLUNTARILY, IN IGNORANCE OF LAW, but with knowledge of all the facts, cannot be recovered back, does not apply where the parties are not upon equal terms in the transaction. *City of Marshall v. Snediker*, 534.

WAGERS.

1. COLLECTION OF MONEY WON AT "TEN-PINS" will not be enforced by the courts. *Monroe v. Smelly*, 541.
2. COMMON-LAW RULE THAT ACTION WILL LIE ON WAGER, though parties have no previous interest in the subject of the wager, is subject to qualifications that no action will lie on wager contrary to public policy, or immoral, or in any respect tending to public detriment, or if it affects the interests, feelings, or character of third person. *Id.*
3. IDLE WAGERS, AND ALL GAMING CONTRACTS, may be properly held to be void. *Id.*

WARRANTY.

1. DISTINCTION BETWEEN WARRANTY AND GUARANTY POINTED OUT. *Sturges v. Bank of Circleville*, 296.
2. VENDOR IS NOT ANSWERABLE FOR QUALITY OF CHATTELS SOLD, unless he has expressly warranted them, or has been guilty of fraudulent representation, or affirmation of a quality known to be false. *Weimer v. Clement*, 411.
3. TO CREATE EXPRESS WARRANTY, IT IS NOT ABSOLUTELY NECESSARY to use the word "warrant," if the words employed are tantamount to it, and are not dubious or equivocal. *Id.*
4. CIVIL-LAW MAXIM, THAT "A SOUND ARTICLE IS WARRANTED BY A SOUND PRICE," was not the maxim of the common law, and has never been adopted in Pennsylvania. *Id.*
5. NO EXPRESS WARRANTY ARISES FROM MERE UNFOUNDED NAKED AFFIRMATION of soundness in the sale of a chattel, but for a willful misrepresentation, the remedy is by action *ex delicto*. *Id.*
6. IN ACTION BY VENDOR FOR PRICE OF CHATTEL, vendee may set up willful misrepresentation and deceit to resist a recovery, and by proving a failure of the consideration, show that in equity and good conscience the plaintiff ought not to recover. *Id.*
7. DECLARATION IN ACTION FOR BREACH OF WARRANTY OF SOUNDNESS OF HORSE, which alleges that the horse was unsound, is sufficient without specifying the particular kind of unsoundness. *Wheeler v. Wherlock*, 617.
8. IT IS NO VARIANCE TO PROVE THAT SELLER OF HORSE REPRESENTED and warranted the animal to be sound, so far as he knew, and that in fact he knew him to be unsound, in an action for false and fraudulent representations of the soundness of the horse, joined with a count for a false warranty of soundness with knowledge of the unsoundness. *Id.*

9. IN EXECUTORY CONTRACTS TO FURNISH ARTICLES FOR SPECIFIC PURPOSE, there is an implied warranty that the article delivered shall answer the purpose for which it is designed, inasmuch as the purchaser has not an opportunity of inspecting or testing it. If found defective, he may return it in a reasonable time and recover its price if paid. *Fisk v. Trak*, 737.
10. IN CASE OF WARRANTY, DIRECT OR IMPLIED, if the article purchased proves defective or unfit for the use intended, the purchaser may, without returning or offering to return it, and without notifying the vendor of its defects, bring his action for the recovery of damages, or if sued for the price, may set up and have damages allowed to him by way of recoupment from the sum stipulated to be paid. *Id.*
11. IN CONSTRUING CONTRACT which provides that certain machinery shall be set in position by a specified time, and if any of it should prove defective, or in any manner fail to answer the purposes intended, on a trial of twenty days, the manufacturer should make it good by repairing the defects, it was held by the court that without such provision the vendor could not, as a matter of right, repair defects in the machinery after it was delivered to the purchaser, nor could the latter require him to repair it; that after the expiration of the twenty days such rights ceased; nor was the vendee bound to give the vendor notice of defects discovered after the twenty days expired. His right of action for damages accrued to him from a breach of the contract, if defective machinery had been delivered, and a failure to remedy such defects within the twenty days mentioned in the contract. The vendee need not repair, or even use the machinery, to enable him to avail himself of his right to damages. *Id.*
12. WHERE BREACH OF WARRANTY THAT MACHINERY SHOULD BE PUT INTO STEAMBOAT, "adapted for and suitable for the boat," is claimed in a suit, and plaintiff offers proof tending to show that it did not answer the purposes intended, the defendant may prove in rebuttal that it was the weakness of the boat, and not defective machinery or unskillful workmanship, which caused the failure in the operation of the machinery. *Id.*
13. STIPULATION IN CONTRACT IS NOT WARRANTY OF STRENGTH OF BOAT, by a party to such contract, when it provides that such party will furnish to the other party to such contract, and place in a certain steamboat, machinery adapted to and suitable for the boat, and that would drive her from twelve to fifteen miles per hour. The vendee of the machinery is to furnish suitable machinery, but the vendor takes the risk of the boat being strong enough to endure the weight, shock of running the machinery, and of its friction when in motion. *Id.*
14. MEASURE OF DAMAGES, WHERE THERE HAS BEEN BREACH OF WARRANTY to furnish machinery for a steamboat, is the difference in value between the machinery furnished and that called for by the contract, adding thereto an allowance for any expense plaintiff may have incurred in his business because of the breach of warranty. To this, also, interest may be added. *Id.*
15. PLEADING OF PARTY WHO RELIES ON MERE GENERAL WARRANTY OF QUALITY OF GOODS sold need not state whether the warranty is express or implied. A general averment that the vendor warranted the articles to be of a good quality is sufficient, and proof of a warranty of either kind will support the averment. *Hoe v. Sanborn*, 163.

16. **WHENEVER ARTICLE SOLD HAS SOME LATENT DEFECT WHICH IS KNOWN TO SELLER**, but not to the buyer, the seller is liable for this defect, if he fails to disclose his knowledge on the subject at the time of the sale. If his knowledge is proved by direct evidence, his responsibility rests upon the ground of fraud; but in a case where the probability of knowledge on his part is so great that the court will presume its existence without proof, he is held responsible upon an implied warranty. The only difference between these two classes of cases is, that in one the *scienter* is actually proved, in the other it is presumed. *Id.*
17. **MANUFACTURER WHO SELLS GOODS OF HIS OWN MANUFACTURE IMPLICITLY WARRANTS** that they are free from any latent defect growing out of the process of manufacture; but he is not liable for any latent defect in the material which he is not shown and cannot be presumed to have known. *Id.*
18. **DIFFERENCE BETWEEN DOCTRINE OF CIVIL LAW AND THAT OF COMMON LAW** in respect to implied warranties discussed by Selden, J. *Id.*

WATERS.

See EASEMENTS, 4, 5; NUISANCE, 3; RIPARIAN RIGHTS.

WAYS.

See EMINENT DOMAIN, 2.

WILLS.

1. **IN ATTESTATION OF WILL**, the order of signing is immaterial so long as the signing by the witnesses and testator was all done at the same moment and in the same presence. The English law is more exacting than ours, hence the decisions under it are not authority here. *Müller v. McNeill*, 333.
2. **WILLS OF BOTH REAL AND PERSONAL ESTATE MUST BE IN WRITING**, and parol evidence is not admissible to add to, contradict, or vary their contents. *Cleveland v. Havens*, 90.
3. **PAROL EVIDENCE CANNOT, AS GENERAL RULE, BE ADMITTED TO CONTRADICT, ADD TO, OR EXPLAIN CONTENTS OF WRITTEN WILL**; even though the consequences may be the total or partial failure of the testator's intended disposition. *Wetherly v. Wetherly*, 499.
4. **PAROL EVIDENCE IS ADMISSIBLE TO EXPLAIN OR REMOVE LATENT AMBIGUITY IN WRITTEN WILL**; but such ambiguity must appear upon the face of the paper. If no ambiguity appears, such evidence will not be admitted. *Id.*
5. **PAROL EVIDENCE IS SOMETIMES ADMISSIBLE TO EXPLAIN AMBIGUITY UPON FACTUM OF WILL**, where such ambiguity is shown upon the face of the instrument. *Id.*
6. **AMBIGUITY UPON FACTUM MEANS, NOT AMBIGUITY UPON CONSTRUCTION**, as whether a particular clause shall have a particular effect, but an ambiguity as to the foundation itself of the instrument, or a particular part of it, as whether the testator meant a particular clause to be part of the instrument, or whether it was introduced with his knowledge; whether a codicil was meant to republish a former or subsequent will; or whether the residuary clause, or any other passage, was accidentally omitted. *Id.*
7. **WHERE THERE IS SOME ABSURDITY OR AMBIGUITY ON FACE OF WILL**, ascribable to something either omitted or inserted, and there is clear

- and satisfactory proof that the insertion or omission was not intended by the testator, the ecclesiastical court is bound to pronounce for the will; not in its actual state, but with its errors removed or corrected. *Id.*
8. **COURTS OF EQUITY HAVE POWER TO CORRECT MISTAKES IN WILLS**, where they clearly appear on its face, or are made to clearly appear from a legal construction of its terms. *Id.*
 9. **TESTATOR'S INTENTION WILL PREVAIL OVER WORDS IN HIS WILL**, and it is the duty of all courts to give effect to such intention. *Id.*
 10. **MISTAKES IN WILL ARE NEVER TO BE INTENDED**, if a reasonable construction can be found out; and reference to other parts of the will may be had in order to supply an omission or explain a mistake. *Id.*
 11. **EXAMPLE OF OMISSION IN WILL WHICH EQUITY WILL SUPPLY**.—Where a will shows upon its face what property the testator owned: that he intended to dispose of it all, and supposed that he had done so; that he had disposed of it all except one half of his land; and that there was left in the will an incomplete clause, omitting to state the subject of any gift, but which was plainly intended to be the other moiety of the land—a court of equity will supply the omission. The omission is apparent upon the face of the paper, and extrinsic evidence is unnecessary to supply it. *Id.*
 12. **LIMITATION IN WILL TO ONE FOR LIFE** with a power of appointment in favor of the issue of his body, and in default of such appointment, to such issue, and if he die leaving no issue of his body, then over, creates an estate-tail in the first taker. *Kay v. Scates*, 399.
 13. **IN DEVISE OF LANDS, USE OF WORDS "LEAVING NO ISSUE OF HIS BODY"** indicates an indefinite failure of issue. *Id.*
 14. **WORD "ISSUE" IN WILL** is primarily word of limitation. *Id.*
 15. **DEVISE BY TESTATOR OF ONE THIRD OF HIS ESTATE** to each of his three children for life, with power of appointment in favor of the issue of his or her body, in default thereof to said issue, and in default of any issue to the heirs of the testator, directing the same to be held in trust by his executors, who were directed to sell and invest the property in real estate, and allow the children, from their income therefrom, such money for their support and education as they may think proper, and also, on their attaining the age of twenty-five, to pay them, respectively, during their natural lives, in quarterly installments, the income of the said real estate for their respective benefit, would, on the children's attaining respectively the age of twenty-five, create a complete estate-tail in each, clear of the trust, which, by the Pennsylvania act of 1855, would be converted into an estate in fee-simple. *Id.*
 16. **IF PERSONAL PROPERTY IS BEQUEATHED UPON CONDITION** which, before the time of performance, becomes impossible to be performed, the property vests in the legatee upon the death of the testator, unless it appears that the performance of the condition was the sole motive for the making of the bequest. *Nunnery v. Carter*, 231.
 17. **PERSONAL PROPERTY WAS BEQUEATHED TO SON ON CONDITION** that he take care of his mother during her life-time: it was held to be a condition subsequent, and the title vested in the legatee, to be divested upon his failure to take care of his mother. It was a continuing duty. *Id.*
 18. **BEQUEST OF INTEREST OR PRODUCE OF FUND TO LEGATEE OR IN TRUST FOR HIM**, without any limitation as to continuance, bequeaths also the principal. *Craft v. Snook's Executors*, 94.

See EXECUTORS AND ADMINISTRATORS; ESTATES OF DECEASED.

WITNESSES.

1. ASSIGNOR OF CERTIFICATE OF DEPOSIT NOT NEGOTIABLE IS NOT COMPETENT WITNESS to support it in an action by the transferee. *Savings Fund Society v. Savings Bank*, 390.
2. DEFENDANT MAY, IF WILLING, BE EXAMINED AS WITNESS for plaintiff in an action of *indebitatus assumpsit*. *Id.*
3. EXCEPTIONS TO OVERRULING OF OBJECTIONS TO COMPETENCY OF WITNESS will not be reviewed, unless the record shows that he testified to some material fact in the case. *Stone v. Darnell*, 582.

See EXPERTS.

WRITS OF ASSISTANCE.

1. EXERCISE OF POWER TO GRANT WRIT OF ASSISTANCE RESTS IN SOUND DISCRETION OF COURT, and the power will never be exercised in a case of doubt, nor under color of its exercise will a question of legal title be tried or decided. *Schenck v. Conover*, 95.
2. WRIT OF ASSISTANCE WILL ISSUE AS WELL WHEN SPECIAL ORDER IS MADE AFTER SALE for delivery of possession as when the direction for delivery of possession is included in the decree. *Id.*
3. WRIT OF ASSISTANCE MAY BE MADE, NOT ONLY AGAINST DEFENDANT, but also against any party in possession under him, or by title not superior to his. *Id.*
4. WRIT OF ASSISTANCE WILL BE GRANTED AT INSTANCE OF PURCHASER AFTER SALE as well as on the application of the complainant; to a stranger to the record, who purchases at a foreclosure sale, as well as to the mortgagee. *Id.*

See VENDOR AND VENDEE, 2, 4.

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